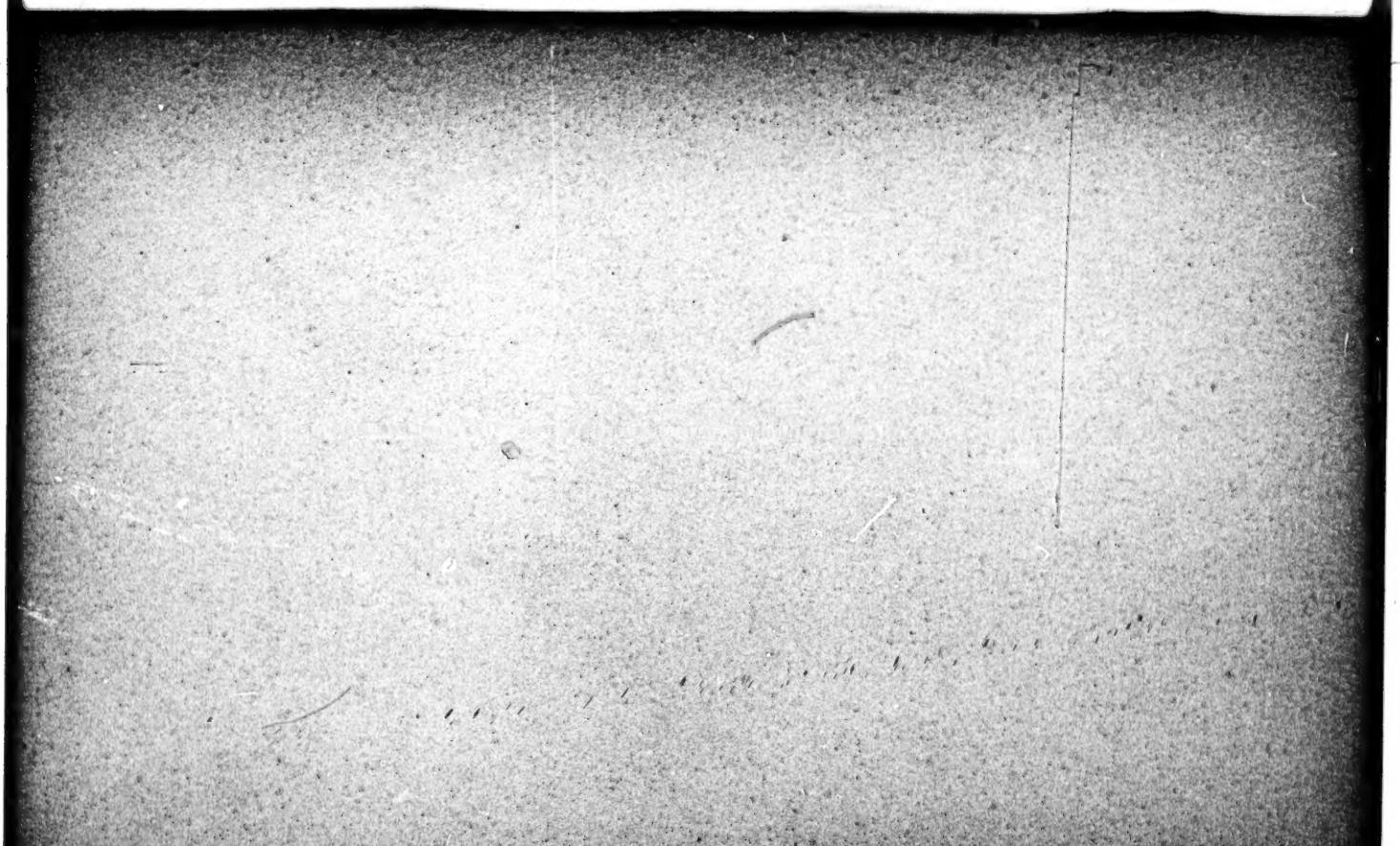

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
AUG 15 1974
MICHAEL RODAK, JR.

No. 73-5772

ANTHONY PASQUALL FARETTA,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the California Court of Appeal, Second Appellate District, is unreported and appears at A. 25. The order of the California Supreme Court denying a Petition For Hearing is likewise unreported and appears at A. 32.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3), the petitioner having asserted below and in this Court a deprivation of rights secured by the Constitution of the United States.

The California Supreme Court denied the Petition For Hearing on August 22, 1973. (A. 32). The Petition For a Writ of Certiorari was timely filed on November 17, 1973, and was granted on March 18, 1974. (A. 65).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

It involves the Due Process Clauses of the Fifth and Fourteenth Amendments.

It further involves Article I, Section 13 of the California Constitution, which provides in material part as follows:

> In criminal prosecutions, in any court whatever, the party accused shall have the right to . . . have the assistance of counsel for his defense . . . and to be personally present with counsel. . . . The Legis-

lature shall have power to require the defendant in a felony case to have the assistance of counsel. . . .

It further involves Section 686 of the California Penal Code which provides in material part as follows:

In a criminal case the defendant is entitled:

. . . .

2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel, except that in a capital case he shall be represented in court by counsel at all stages of the preliminary and trial proceedings.

Also involved is Section 859 of the California Penal Code, which provides in material part as follows:

When the defendant is charged with the commission of a public offense over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he shall, without unnecessary delay, be taken before a magistrate of the court in which such complaint is on file. The magistrate shall immediately deliver to him a copy of the complaint, inform him that he has the right to have the assistance of counsel, ask him if he desires the assistance of counsel, and allow him reasonable time to send for counsel. However, in a capital case, the court shall inform the defendant that he must be represented in court by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel, or at public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned for him, and allow him a reasonable time to send for his chosen or assigned counsel. . . . upon the request of the defendant, require a peace officer to take a

message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer shall, without delay and without a fee, perform that duty. If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him; in a capital case, if the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to defend him. . . .

Also involved is Section 987 of the California Penal Code, which provides as follows:

(a) In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assistance of counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him.

(b) In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him that he must be represented by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned to him, and allow him a reasonable time to send for his chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him. If the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to him.

QUESTION PRESENTED

Under California law, defense counsel in criminal trials have the power to make strategic decisions, including decisions to exercise or waive rights guaranteed under the federal constitution; counsel need not consult with their clients with respect to these decisions and may take actions which contravene their clients' desires. In this context, the question presented is whether, consistent with the Fifth, Sixth and Fourteenth Amendments, an indigent defendant can be denied the right to present his own defense and compelled to accept representation by counsel appointed over his objection.[1]

STATEMENT

Petitioner was convicted, following a trial by jury in the Superior Court of Los Angeles County, of grand theft in violation of Section 487(3) of the California Penal Code. Although the public defender was initially appointed to represent petitioner (A. 4), petitioner subsequently moved the trial court for leave to defend *pro se.* Inquiries of the court elicited that petitioner had previously represented himself; that he had a high

[1] The Petition For a Writ of Certiorari raised a second question concerning the refusal of the public defender assigned to represent petitioner to call a witness believed by petitioner to be material to his defense. The record, however, appears to be inadequate to permit a presentation of that question and petitioner, without intending to waive his right to assert his claim in an appropriate post-conviction proceeding, does not pursue it here.

school education; and that although he recognized that the public defender's office was capable of furnishing "equal representation" he believed it was "very loaded down with . . . a heavy case load." (A. 35). The trial court cautioned petitioner that in its view he was "making a mistake" and that in all further proceedings he would "be treated like a lawyer" (A. 38), adding:

> You are going to follow the procedure. You are going to have to ask the questions right. If there is an objection to the form of the question and it is properly taken, it is going to be sustained. We are going to treat you like a gentleman. We are going to respect you. We are going to give you every chance, but you are going to play with the same ground rules that anybody plays. And you don't know those ground rules. You wouldn't know those ground rules any more than any other lawyer will know those ground rules until he gets out and tries a lot of cases. And you haven't done it. (A. 38).

But after carefully establishing on the record that petitioner desired to represent himself and did not want to be represented by counsel, the court made a "preliminary ruling" accepting his waiver of counsel and granting him the right to defend *pro se*. (A. 40). However, the court reserved the right to revoke its ruling if at any time it became apparent that petitioner was unable to represent himself. (A. 40).

Several weeks later, the court, on its own motion, made further inquiry of petitioner with respect to his ability to represent himself. That colloquy was as follows:

THE COURT: In the Faretta matter, I brought you back down here to do some reconsideration as to whether or not you should continue to represent yourself.

How have you been getting along on your research?

THE DEFENDANT: Not bad, your Honor.

Last night I put in the mail a 995 motion and it should be with the Clerk within the next day or two.

THE COURT: Have you been preparing yourself for the intricacies of the trial of the matter?

THE DEFENDANT: Well, your Honor, I was hoping that the case could possibly be disposed of on the 995.

Mrs. Ayers informed me yesterday that it was the Court's policy to hear the pretrial motions at the time of trial. If possible, your Honor, I would like a date set as soon as the Court deems adequate after they receive the motion, sometime before trial.

THE COURT: Let's see how you have been doing on your research.

How many exceptions are there to the hearsay rule?

THE DEFENDANT: Well, the hearsay rule would, I guess, be called the best evidence rule, your Honor. And there are several exceptions in case law, but in actual statutory law, I don't feel there is none.

THE COURT: What are the challenges to the jury for cause?

THE DEFENDANT: Well, there is twelve peremptory challenges.

THE COURT: And how many for cause?

THE DEFENDANT: Well, as many as the Court deems valid.

THE COURT: And what are they? What are the grounds for challenging a juror for cause?

THE DEFENDANT: Well, numerous grounds to challenge a witness – I mean, a juror, your Honor, one being the juror is perhaps suffered, was a victim of the same type of offense, might be prejudice toward the defendant. Any substantial ground that might make the juror prejudice[d] toward the defendant.

THE COURT: Anything else?

THE DEFENDANT: Well, a relative perhaps of the victim.

THE COURT: Have you taken a look at that code section to see what it is?

THE DEFENDANT: Challenge a juror?

THE COURT: Yes.

THE DEFENDANT: Yes, your Honor. I have done –

THE COURT: What is the code section?

THE DEFENDANT: On voir diring a jury, your Honor?

THE COURT: Yes.

THE DEFENDANT: I am not aware of the section right offhand.

THE COURT: What code is it in?

THE DEFENDANT: Well, the research I have done on challenging would be in Witkins Jurisprudence.

THE COURT: Have you looked at any of the codes to see where these various things are taken up?

THE DEFENDANT: No, your Honor, I haven't.

THE COURT: Have you looked in any of the California Codes with reference to trial procedure?

THE DEFENDANT: Yes, your Honor.

THE COURT: What codes?

THE DEFENDANT: I have done extensive

research in the Penal Code, your Honor, and the Civil Code.

THE COURT: If you have done extensive research into it, then tell me about it.

THE DEFENDANT: On empaneling a jury, your Honor?

THE COURT: Yes.

THE DEFENDANT: Well, the District Attorney and the defendant, defense counsel, has both the right to 12 peremptory challenges of a jury. These 12 challenges are undisputable. Any reason that the defense or prosecution should feel that a juror would be inadequate to try the case or to rule on a case, they may then discharge that juror.

But if there is a valid challenge due to grounds of prejudice or some other grounds, that these aren't considered in the 12 peremptory challenges. There are numerous and the defendant, the defense and the prosecution both have the right to make any inquiry to the jury as to their feelings toward the case.

THE COURT: The Court having observed the conduct and the demeanor of the defendant, in addition to what he said, does not believe that the defendant has made an intelligent and knowing waiver of his constitutional right to be represented by an attorney. Also taking into consideration the recent case of People versus Sharp, where the defendant apparently does not have a constitutional right to represent himself, the Court finds that the ends of justice and requirements of due process require that the prior order permitting the defendant to represent himself in pro per should be and is hereby revoked. That privilege is terminated.

The Public Defender is appointed to represent the defendant in this case. (A. 46-48).

Petitioner promptly urged that he was entitled under the Sixth Amendment to the assistance of counsel of his own choice. He moved for leave to act as co-counsel, and this motion was likewise denied. (A. 49). Petitioner on three occasions moved for the appointment of a lawyer other than the public defender, and these motions were denied. (A. 49, 54, 58-59).

Following the termination of the order entitling petitioner to defend *pro se* and the appointment of the public defender, on several occasions petitioner was denied an opportunity to make requests and motions on his own behalf, the trial court requiring petitioner to act solely through his counsel. *E.g.*, A. 49, 63, 64).

At the conclusion of the trial, the jury found petitioner guilty of grand theft in violation of Section 487(3) of the California Penal Code. (A. 13). Petitioner was sentenced to state prison for the term prescribed by law.

On appeal, the California Court of Appeal stated that petitioner had no constitutional right to represent himself, citing a recent decision of the Supreme Court of California. *People v. Sharp*, 7 Cal.3d 448, 103 Cal.Rptr. 233, 499 P.2d 489 (1972), *cert. den.*, 410 U.S. 944 (1973). It held that the trial court could not be said to have "abused its discretion in concluding that Faretta had not made a knowing and intelligent waiver of his right to be represented by counsel" and that petitioner "did not appear aware of the possible

consequence of waiving the opportunity for skilled and experienced representation at trial." (A. 27).[2]

[2] Although from the face of the applicable California Statutes (Calif. Pen. Code §§686, 859, and 987) it might appear that the Court of Appeal was in error in concluding that under California law an accused has no right to defend *pro se*, at least in a non-capital case, its decision was indeed in accordance with the controlling decision of the Supreme Court of California. In *People v. Sharp*, 7 Cal.3d 448, 103 Cal. Rptr. 233, 499 P.2d 489 (1972), *cert. den.*, 410 U.S. 944 (1973), the Supreme Court declared that as a matter of both California and Federal Constitutional law a defendant has no right to defend *pro se*. *Sharp* represented a departure from previous interpretations of California law. See Note, *Where is the Constitutional Right to Self Representation and Why is the California Supreme Court Saying All Those Terrible Things About It?*, 10 CALIF. WESTERN L. REV. 196, 198 n. 14 (1973). The California Constitution, as it then read at the time *Sharp* was tried, provided that a defendant in a criminal case had the right "to appear and defend, in person and with counsel." Article I, Section 13. The California Supreme Court had construed that language as meaning "in person *or* with counsel"; the accused could be made to choose between self-representation and representation by an attorney. *People v. Mattson*, 51 Cal.2d 777, 336 P.2d 937 (1959). In *Sharp*, however, the California Supreme Court concluded that, earlier judicial expressions to the contrary, Article I, Section 13 did not create a right to defend *pro se*.

By the time *Sharp* was decided, the California Constitution had been amended, and new legislation enacted; although these revised provisions were not applicable in *Sharp*, the Court in an appendix commented upon them. See 7 Cal.3d, at 463-64. The right of the defendant to "appear and defend in person" was deleted from Article I, Section 13, and the Legislature was expressly empowered "to require the defendant in a felony case to have the assistance of counsel." The new statutes, however, on their face purport to exercise that power only in capital cases. See CALIF. PEN. CODE §§686(2), 686.1, 859, & 987. In

SUMMARY OF ARGUMENT

I.

The question of whether a defendant in a criminal case is entitled to defend *pro se* must be examined in the specific context of California criminal procedure:

(a) An indigent defendant is not entitled to select his own counsel. In counties with a public defender's office, the accused ordinarily must accept the assignment of any attorney from that office. When private counsel is appointed, the court's discretion in making the selection is virtually total; the defendant has no right to compel the appointment of any particular lawyer, even where the lawyer of his choice is willing to serve at the established rate of compensation. As a consequence, an indigent defendant has no right to select his counsel and may be represented by an attorney he does not want and in whom he does not repose confidence.

(b) Once a defendant is represented by counsel, the lawyer becomes the manager of the lawsuit. Except as to a very few particularly fundamental decisions (*i.e.*, to plead guilty, waive jury trial, and whether or not to testify), counsel's decisions as to fundamental matters of trial strategy and the exercise of the defendant's constitutional rights are final.

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non-capital cases, the defendant by statute continues to have the right "to appear and defend in person and with counsel." *Id.*, §686(2). However, the California Supreme Court, in an appendix to *Sharp*, expressly stated that this language, identical to the former Article I, Section 13 construed in *Sharp*, does not provide a right of self-representation. 7 Cal.3d, at 464.

(c) A defendant will not be relieved from the consequences of his counsel's actions, and cannot attack his representation as inadequate, unless the representation afforded him was so demonstrably insufficient as to reduce the trial to a "farce or a sham." There is thus a measurable gap between grossly incompetent representation for which there is an appellate or collateral remedy and representation which, objectively measured, was genuinely competent.

This case does not call these aspects of California criminal procedure into question. A defendant who chooses to be represented by counsel can reasonably be regarded as acceding to this settled allocation of power between client and counsel. But for the present case the consequences of these aspects of California practice are significant. For in California, an indigent defendant may well be assigned an attorney in whom he has no confidence and who may insist upon taking actions with which he does not agree. In those circumstances, the defendant has no recourse – unless he is permitted to defend *pro se*.

II.

The right to present one's own defense has been assumed to be of constitutional dimension in several decisions of this Court, most notably *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942). The right is not merely a privilege to reject that which the Sixth Amendment right-to-counsel clause assures. Rather, at least in the context of a system which denies the

indigent defendant the right to select the counsel of his choice and requires him to accept the tactical decisions of his attorney, the right to defend *pro se* is the only available means by which the accused can ensure that the defense which is presented is the defense of *his* choice. It is a right of fundamental importance, reflected in the very structure of the Sixth Amendment, and equally an essential component of due process of law.

The right of an accused to present his own defense was virtually unquestioned at the time of the Constitution's adoption. Both in England and in colonial America, the common practice was for persons accused of crimes to represent themselves. Moreover, early documents evidence a widespread hostility to lawyers and, reflecting that antipathy, guarantee the right of an accused personally to plead his cause. Thus the right to defend *pro se* was widely appreciated at the time the Constitution was adopted.

In light of contemporary constitutional principles, the right to defend *pro se* is at the core of due process. At bottom, the generalized concept of due process – illuminated by the confrontation and compulsory process clauses of the Sixth Amendment – means that a defendant in a criminal case cannot be deprived of the opportunity to shape and present his defense according to his own lights. If he elects to be represented by counsel, he of course may be deemed to have acceded to the customary allocation of power which leaves to counsel the authority to make fundamental tactical and procedural choices. But he cannot be compelled to do so where the consequence,

under local law, is to deprive him of the power to see his defense presented as he wants it to be.

The entire focus of the Sixth Amendment is upon the rights of "the accused." It is *his* right – not counsel's . – "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Thus the Court has found within the concept of due process and the Sixth Amendment a right of the accused to be present at all critical stages. That right confers more than the opportunity to be an interested spectator. Its constitutional standing was explained by Justice Cardozo as resting upon the defendant's right "to give advice . . . or even to supersede his lawyers altogether and conduct the trial himself." *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934).

In most cases, the defendant will wish to be represented by counsel and will accept the consequences of that representation. But where that relationship is not one of trust and confidence, the imposed assistance of counsel does not ensure that the accused's trial will comport with due process. In that circumstance, especially when the defendant does not concur in the lawyer's proposed course of defense, then the right of self-representation provides the only available alternative to a circumstance which is intolerable from the point of view of defendant, counsel and court. Even though the accused's grounds for disagreement with and perceptions about his lawyer may, objectively viewed, seem unfair, he is unlikely to be disabused of them; and if convicted he will surely harbor deep resentments concerning the process which resulted in punishment. Respect for individual dignity is served by permitting the accused, even where his defense might have bette been presented by an attorney, "to go to jail under his own banner if he so

desires and if he makes the choice 'with eyes open.' " *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965), *cert. den.*, 384 U.S. 1007 (1966).

III.

The right of self-representation imposes no burdens upon the administration of justice which would warrant its infringement. The defendant who represents himself is not entitled to be treated differently than defendants represented by counsel. While trial judges are frequently solicitous in such cases, nothing in the Constitution requires them to assist *pro se* defendants. Moreover, it is open to the trial judge to appoint "standby counsel" to provide such assistance as the *pro se* defendant needs and wants. That procedure is available in California and should be encouraged.

Instances of courtroom disruption by defendants representing themselves have been exceedingly rare. But for those who do not conform their conduct to the requirements of the trial court, there are swift and effective remedies, including contempt, termination of the right of self-representation, and in extreme cases removal from the courtroom. *Illinois v. Allen*, 397 U.S. 337 (1970).

IV.

The accused who seeks to defend *pro se* should be permitted to do so unless his relinquishment of the

right to counsel cannot be said to be knowing and intelligent. The controlling test is the familiar standard of waiver; as the Court phrased it, the issue is whether the accused "knows what he is doing and [whether] his choice is made with eyes open." *Adams v. United States ex rel. McCann, supra,* at 279. Once it is determined that the waiver is knowing and intelligent, the defendant must be allowed to present his own defense. The trial court may not deny the right simply because the defendant does not seem to possess substantial knowledge of the law, for constitutional rights are not dependant upon possession of a high degree of skill in their exercise.

V.

This Court recognized in *Chapman v. California,* 386 U.S. 18, 23 (1967) that some rights are so basic that their denial can never be regarded as harmless. The right to defend *pro se* is such a right. At stake is a question of fundamental fairness raised by a process which denies the defendant, whose liberty is at stake, the right to control the presentation of his defense. Moreover, to inject the issue of whether the error was "harmless" in the sense that it contributed to the outcome would denigrate the right "since rarely if ever can there be a showing of prejudice in terms of result from the conduct of a trial by counsel." *United States v. Dougherty,* 473 F.2d 1113, 1148 (D.C. Cir. 1972).

ARGUMENT

I.

INTRODUCTION: THE CONSEQUENCES OF REPRESENTATION BY COUNSEL IN CALIFORNIA.

A. Counsel Has Authority to Make Binding Decisions.

A defendant who retains counsel, or who accepts the appointment of an attorney, is bound under California law to accept the consequences of representation. The power of his attorney to make important strategic decisions, including those which involve the decision to exercise or to waive rights guaranteed under the federal constitution, is established. A lawyer representing a criminal defendant is "the manager of the lawsuit." *Rhay v. Browder*, 342 F.2d 345, 349 (9th Cir. 1965). On a wide variety of matters, his decision binds the client, whether made without consultation or even, after consultation, in express disregard of the client's desires. The following are examples of the California decisions in this regard:

(1) Counsel may decide not to cross-examine an adverse witness (a right guaranteed under the Sixth and Fourteenth Amendments, *see, e.g., Chambers v. Mississippi*, 410 U.S. 284 (1973)). *E.g., People v. Foster*, 67 Cal.2d 604, 606-07, 63 Cal.Rptr. 288, 432 P.2d 976 (1967); *People v. Monk*, 56 Cal.2d 288, 299 14 Cal.Rptr. 633, 363 P.2d 865 (1961). See also *Brookhart v. Janis*, 384 U.S. 1, 8 (1966) (Harlan, J. concurring).

(2) Counsel may decide not to call witnesses desired by the defendant to be subpoened. *E.g., People v. Williams,* 2 Cal.3d 894, 905, 88 Cal.Rptr. 208, 471 P.2d 1008 (1970), *cert. den.,* 401 U.S. 919 (1971); *People v. Monk, supra; People v. Seals,* 191 Cal.App.2d 734, 739, 13 Cal.Rptr. 7 (1961).

(3) Despite the express demand of the defendant that a plea of not guilty by reason of insanity be withdrawn, counsel may insist that the plea stand. *People v. Merkouris,* 46 Cal.2d 540, 554-55, 297 P.2d 999 (1956).

(4) Counsel may decline to object to the introduction of evidence on Fourth Amendment grounds and thereby waive the defendant's constitutional claim. *E.g., People v. Pineda,* 253 Cal.App.2d 443, 470, 62 Cal.Rptr. 144 (1967); *cf. People v. Garrison,* 246 Cal.App.2d 343, 350-51, 54 Cal.Rptr. 731 (1966) (tactical decision of counsel to refrain from objecting to introduction of tape recordings of conversations between defendant and his wife binding upon client). Such a waiver by counsel is likewise binding upon the client for federal habeas corpus purposes. See *Henry v. Mississippi,* 379 U.S. 443 (1965).

(5) Counsel may agree to a continuance, without consultation with the defendant, thus waiving his right to speedy trial under *Smith v. Hooey,* 393 U.S. 374 (1969). *E.g., McCullar v. Superior Court,* 264 Cal.App.2d 1, 5, 70 Cal.Rptr. 21 (1968). The power of counsel to bind the defendant in this respect is implicit in *Barker v. Wingo,* 407 U.S. 514, 534-36 (1972).

(6) Counsel may withdraw a motion for mistrial without the consent of his client. *People v. Watson*, 244 Cal.App.2d 89, 95, 52 Cal.Rptr. 821 (1966).

(7) Counsel may prevent – by refusing to join in the motion – a defendant from making a peremptory challenge to the trial judge.[3] *People v. Jackson*, 186 Cal.App.2d 307, 8 Cal.Rptr. 849 (1960).

(8) A defendant represented by counsel may not argue his cause to the jury over the objections of his counsel. *People v. Hill*, 70 Cal.2d 678, 691-92, 76 Cal.Rptr. 225, 452 P.2d 329 (1969) (penalty trial in capital case).

(9) Counsel may, despite the objections of the client, refrain from moving under Section 995 of the Penal Code to set the information aside on grounds of legal insufficiency. *People v. Nailor*, 240 Cal.App.2d 489, 494, 49 Cal.Rptr. 616 (1966). This principle presumably would apply to an election not to challenge a grand jury on grounds of racial exclusion. See *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973) (en banc).

In general, then, counsel may waive fundamental – indeed, constitutionally protected – rights of the

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[3] Under California procedure, any party to a criminal or civil case may make a peremptory challenge to the judge. If such a motion is timely made, the judge must be disqualified. CALIF. CODE CIV. PRO. §170.6. Understandably, such motions are not inevitably appreciated by trial judges, and many California trial attorneys are reluctant to exercise the right to make such a challenge.

defendant.[4] He need not apprise the defendant of those rights or discuss them with him. Moreover, in the event of disagreement counsel's judgment is controlling.

B. An Indigent Has No Right to Select Counsel Of His Choice.

The grant of power to counsel just described is made vastly more significant by two other features of California law. First, the right of an indigent defendant to counsel does not entitle him to select the counsel of his choice. In many counties, including Los Angeles, there is a public defender. In that circumstance, the trial court is required to appoint the public defender unless "the court finds that because of a conflict of interest or other reasons the public defender has properly refused to represent the person accused." CALIF. PEN. CODE §987.2; see *People v. Hughes*, 57 Cal.2d 89, 98, 17 Cal.Rptr. 617, 367 P.2d 33 (1961) (interpreting predecessor statute, CALIF. PEN. CODE §987a). See also *Drumgo v. Superior Court*, 8 Cal.3d

[4]There are a few instances in which the client's desires as respects the exercise of rights deemed particularly fundamental are controlling. Article I, Section 7 of the California Constitution requires an express waiver by the defendant of the right to jury trial. See *People v. Hill*, 67 Cal.2d 105, 114, 60 Cal. Rptr. 239, 429 P.2d 586 (1967); see also *Patton v. United States*, 281 U.S. 276, 312 (1930). A guilty plea, of course, requires the defendant's personal acquiesence as a matter of federal constitutional law. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Brookhart v. Janis*, 384 U.S. 1 (1966). And counsel cannot prevent his client from testifying. *People v. Robles*, 2 Cal.3d 205, 214-15, 85 Cal. Rptr. 166, 466 P.2d 170 (1970).

930, 106 Cal.Rptr. 631, 506 P.2d 1007, *cert. den.*, ___ U.S. ___, 38 L.Ed.2d 223 (1973); *People v. Miller*, 7 Cal.3d 562, 574, 102 Cal.Rptr. 841, 498 P.2d 1089 (1972); *People v. Massie*, 66 Cal.2d 899, 910, 59 Cal.Rptr. 733, 428 P.2d 869 (1967); *People v. Taylor*, 259 Cal.App.2d 448, 450-51, 66 Cal.Rptr. 514 (1968). Indeed, the defendant does not even have the right to object to the assignment of a particular deputy public defender or to demand a deputy he specifically desires. *Drumgo v. Superior Court, supra*, at 934; *People v. Stroble*, 36 Cal.2d 615, 629, 226 P.2d 330 (1951), *aff'd.*, 343 U.S. 181 (1952). And where a disagreement arises in mid-trial over questions of trial strategy, the indigent defendant cannot compel the appointment of another lawyer. *See, e.g., In re Luna*, 257 Cal.App.2d 754, 757, 65 Cal.Rptr. 121 (1968) and cases cited.

Even where private counsel must be appointed, the defendant's desires need not be respected. *Drumgo v. Superior Court, supra.*[5] The *Drumgo* case illustrates the California practice. There the public defender had a conflict of interest and was unable to represent Drumgo, a defendant in a serious murder case. Drumgo sought the appointment of attorney Hodge, a concededly able lawyer who was ready, willing and able to represent him. The trial court, however, appointed another attorney over the objections of Drumgo, attorney Hodge, and the appointed lawyer. This action was upheld by the California Supreme Court, which found such matters to be within the discretion of the

[5]If the defendant becomes dissatisfied with his appointed counsel the trial court is not required to, and frequently will not, appoint another lawyer, even where a serious disagreement exists. See *People v. Williams*, 2 Cal. 3d 894, 88 Cal. Rptr. 208, 471 P.2d 1008 (1970), *cert. den.*, 401 U.S. 919 (1971).

trial judge; the court ruled that, as a matter of law, "there can be no abuse of that discretion when the court appoints competent counsel who is uncommitted to any position or interest which would conflict with providing an effective defense." *Id.*, at 935.

C. The Test of Inadequate Representation Is Stringent.

The other feature of California law and practice which bears upon the issues of this case is the high burden which must be met when a defendant challenges the representation afforded him as legally inadequate. The leading case is *People v. Ibarra*, 60 Cal.2d 460, 34 Cal.Rptr. 863, 386 P.2d 487 (1963), holding that "[t]o justify relief . . . 'an extreme case must be disclosed.' [citations]". *Id.*, at 464. It must appear that counsel's lack of diligence or competence reduced the trial to a "'farce or a sham'." *Id.*, at 464. The showing of incompetence must be substantial. "It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively." *People v. Floyd*, 1 Cal.3d 694, 709, 83 Cal.Rptr. 608, 464 P.2d 64 (1970). "Defendant has the burden . . . of establishing his allegation of inadequate representation 'not as a matter of speculation but as a demonstrable reality.'" *People v. Reeves*, 64 Cal.2d 766, 774, 51 Cal.Rptr. 691, 415 P.2d 35 (1966). "It is not enough that defendant alleges omissions of counsel indicating lack of preparation and general incompetence. He must show that such acts or omissions resulted in a withdrawal of a crucial defense from the

case." *People v. Hill*, 70 Cal.2d 678, 689, 76 Cal.Rptr. 225, 452 P.2d 329 (1969). "[E]ven 'debatable trial tactics' do not 'constitute a deprivation of the effective assistance of counsel.' " *People v. Miller*, 7 Cal.3d 562, 573, 102 Cal.Rptr. 841, 498 P.2d 1089 (1972). These and numerous other reported decisions rejecting inadequacy of counsel claims[6] attest to the reluctance of California appellate courts to set aside a conviction on this ground.[7]

D. In Light of These Aspects of California Law, A Right of Self-Representation Is Essential.

It bears emphasis that we do not criticize the California practice in any of these respects, let alone suggest that any of the California rules are constitutionally infirm. It may be presumed that a defendant, *represented by counsel chosen by or at least acceptable*

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[6] *E.g., People v. Stephenson*, 10 Cal. 3d 652, 111 Cal. Rptr. 556, 517 P.2d 820 (1974); *People v. Reagle*, 6 Cal.3d 441, 99 Cal.Rptr. 313 (1972); *In re Downs*, 3 Cal.3d 694, 91 Cal. Rptr. 612, 478 P.2d 44 (1970); *In re Branch*, 70 Cal.2d 200, 74 Cal.Rptr. 238, 449 P.2d 174 (1969); *In re Beaty*, 64 Cal.2d 760, 764, 51 Cal.Rptr. 521, 414 P.2d 817 (1966); *In re Rose*, 62 Cal. 2d 384, 42 Cal.Rptr. 236, 398 P.2d 428 (1965).

[7] This stringent standard is more restrictive than that evolving in some other jurisdictions. *Compare United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973) ("[A] defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate"); *Coles v. Peyton*, 389 F.2d 224 (4th Cir.), *cert. den.*, 393 U.S. 849 (1968); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974).

to him, should be bound by tactical decisions of counsel even where those decisions affect constitutional rights. This allocation of power to counsel is generally accepted as grounded on sound and fundamental considerations of policy. It is supported by the American Bar Association Project on Standards for Criminal Justice, whose advisory committee stated:

> Numerous strategic and tactical decisions must be made in the course of a criminal trial, many of which will be made in circumstances which will not allow extended, if any, consultation. Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge's charge while the client "plucks at his sleeve" offering gratuitous suggestions. Some suggestions, especially as to which witnesses to call and in what sequence and what should be said in argument to the jury, can be anticipated sufficiently so that counsel can ordinarily consult with his client concerning them. Because these decisions require the skill, training and experience of the advocate, the power of decision on them must rest with the lawyer, but that does not mean that he should completely ignore his client in making them. The lawyer should seek to maintain a cooperative relationship at all stages, while maintaining also the ultimate choice and responsibility for the strategic and tactical decisions in the case.[8]

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[8] ADVISORY COMMITTEE ON THE PROSECUTION AND DEFENSE FUNCTIONS, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 240 (Tent. Draft, March, 1970). Except for decisions as to the plea, waiver of jury trial, and whether the accused should testify (*id.*, §5.2(a)), the report concludes that "decisions on what

As the Court of Appeals for the Ninth Circuit put it:

> One of the surest ways for counsel to lose a lawsuit is to permit his client to run the trial. We think few competent counsel would accept retainers, or appointment under the Criminal Justice Act of 1964, to defend criminal cases, if they were to have to consult the defendant, and follow his views, on every issue of trial strategy that might, often as a matter of hindsight, involve some claim of constitutional right.[9]

It may likewise be presumed that ordinarily an indigent defendant who requests the assistance of counsel may not demand a particular lawyer, and that absent extreme circumstances a court need not relieve a defendant from the consequences of his counsel's actions, even if less than fully competent. These aspects

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witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." *Id.*, §5.2(b).

[9] *Nelson v. California*, 346 F.2d 73, 81 (9th Cir. 1965). The Court of Appeals held that *Fay v. Noia*, 372 U.S. 391 (1963) notwithstanding, counsel's waiver of constitutional rights in numerous matters precludes their subsequent assertion in a federal habeas corpus proceeding. See also *Henry v. Mississippi*, 379 U.S. 443 (1965); *Wilson v. Gray*, 345 F.2d 282 (9th Cir. 1965), *cert. den.*, 382 U.S. 919 (1965). Significantly for present purposes, the Court of Appeals in *Nelson* assumed that a defendant such as Nelson was "not without remedy. He can discharge his counsel and the court can in its discretion, if counsel is appointed, appoint new counsel." *Id.*, at 81 n.9. As we have seen (see pp. 21-23, *supra*), this assumption would not, if applied to present day California practice, be accurate.

of California practice we take to be given, and do not question them here. But they have particular significance in light of the relatively recent California decision (*People v. Sharp*, 7 Cal.3d 448, 103 Cal.Rptr. 233, 499 P.2d 489 (1972), *cert. den.*, 410 U.S. 944 (1973)) stripping a defendant, such as petitioner, of the right to reject the appointment of an attorney he can neither select or direct. The interplay of the principles described above and the rule in *Sharp* was recently described by Mr. Justice Mosk as follows:

> The attorney-client relationship contemplates trust and mutual cooperation, particularly where the attorney is defending the client's liberty. [citation] The desirability of a relationship of trust and confidence between an indigent defendant and his attorney has been elevated to indispensibility as a result of *People v. Sharp* [citations], holding that a defendant has no constitutional right to defend *pro se* at trial. Prior thereto an indigent defendant had three choices open to him if he lacked confidence in his appointed counsel and the judge refused to designate an attorney of his choice: he could permit the attorney to represent him and abjectly be bound by crucial trial decisions with which he might disagree [citations]; he could dismiss the attorney and proceed to represent himself [citations]; or he could in unusual circumstances dismiss the attorney from responsibility for the case and represent himself but have counsel standing by for advice [citations]. After *Sharp* an indigent has no choice as a matter of right; he must be represented by the appointed counsel. Thus in this case [in which the defendant's motion for the appointment of an attorney acceptable to him had been denied], the defendant must

proceed with the appointed attorney, in place of other counsel in whom he has expressed confidence; as a result he will be compelled to acquiese in subsequent trial tactics which he may find objectionable.[10]

For the reasons which follow, the principle introduced in *Sharp* – when embossed upon a system which denies an indigent the power to choose his champion and denies a defendant represented by counsel the power to control the presentation of his defense, including the exercise of fundamental procedural rights – cannot be squared with the imperative of due process.

II.

A DEFENDANT CANNOT BE COMPELLED TO ACCEPT REPRESENTATION BY COUNSEL WHEN A CONSEQUENCE OF SUCH REPRESENTATION IS TO DENY THE DEFENDANT THE POWER TO DETERMINE WHETHER TO WAIVE FUNDAMENTAL RIGHTS AND TO CONTROL THE PRESENTATION OF HIS DEFENSE.

We have described at some length the consequences of a defendant's acceptance of representation by counsel in California[11] because given that relationship

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[10]*Drumgo v. Superior Court,* 8 Cal.3d 930, 938-39 106 Cal.Rptr. 631, 506 P.2d 1007 (1973) (dissenting opinion), *cert. den.*, ___ U.S. ___, 38 L. Ed. 2d 223 (1973).

[11]While doubtless there are variations nationally as to the extent of counsel's power to control the conduct of the defense

the right of an accused to present his own defense takes on special significance.

When the California Supreme Court held, in *People v. Sharp*, 7 Cal.3d 448, 103 Cal.Rptr. 233, 499 P.2d 489 (1972), *cert. den.*, 410 U.S. 944 (1973) that the Constitution does not guarantee the right of self-representation, it did not discuss the issue in the context of the contemporary allocation of responsibility and power between defendant and counsel. Its opinion did not frame the issue as involving the more fundamental question of whether the State may, against the objections of the defendant, deprive him of the right to participate in the shaping and conduct of his defense and personally to decide whether or not to exercise various procedural rights secured to him by the Constitution and by other fundamental laws.[12] Rather, that court, after a cursory determination that the right of self-representation was not historically fundamental,

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and to waive various of the defendant's rights, California law is by no means ideosyncratic. See generally Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1213-20 (1970); *Henry v. Mississippi*, 379 U.S. 443 (1965); see also the American Bar Association Report cited in note 8, *supra*.

[12]It bears emphasis that in so framing the issue which this case presents, we do *not* now contend that a defendant who voluntarily retains or accepts the appointment of counsel must be afforded the final power of management of the defense. Those who knowingly choose to be represented by counsel may be held to the consequence of that election. The question here is whether, given the now apparently settled allocation of power between counsel and client, the State may compel an unwilling defendant to accept counsel.

viewed the question as whether the Sixth Amendment impliedly contained the right to waive the assistance of counsel. It concluded that *Singer v. United States*, 380 U.S. 24 (1965) foreclosed any claim that the Sixth Amendment automatically carried with it the right to reject the appointment of counsel.

Even on its own terms, the analogy to *Singer* is imperfect. *Singer* dealt with the right of trial by jury and concluded that the defendant could not compel the Government to submit to a court trial. As the Court recognized (see 380 U.S., at 25 n.2, 35-36), trial by jury is the "normal and . . . preferable mode of disposing of issues of fact in criminal cases" (*Patton v. United States*, 280 U.S. 276, 312 (1930)), and indeed Article III, Section 2 of the Constitution provides that the trial of all criminal cases "*shall* be by jury." (Emphasis added). Moreover, as the Court noted, "the Government, *as a litigant*, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." (380 U.S. at 36, emphasis added). In contrast, "the Government, *as a litigant*" has no legitimate interest whatever in compelling the accused to accept representation by counsel nor, *a fortiori*, to have the defense conducted in a particular fashion which may differ from that which the accused desires.[13]

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[13]This crucial distinction, overlooked entirely by the California Supreme Court in *Sharp*, applies equally to all of the other examples given in *Singer* of instances in which the accused may not insist upon waiving rights over the objections of the prosecution: the defendant may not (1) waive his right to a

Significantly, when this Court in *Singer* listed various other rights which the accused could not waive over the objections of the prosecution (see note 13, *supra*), it refrained from including the right to counsel as among them.[14] That omission has added significance in light of the Court's earlier expressions on the right of self-representation, most notably *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279-80 (1942):

> The right to assistance of counsel *and the correlative right to dispense with a lawyer's help* are not legal formalisms. They rest on considerations that go to the substance of the accused's position before the law.... [T]he Constitution does not force a lawyer upon a defendant. He may waive his constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. [citation].

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public trial and compel a private one; (2) waive his right to be tried in the district where the crime was committed and compel transfer of the trial to another place; (3) waive his right to be confronted by the witnesses against him and compel the prosecutor to try the case on a stipulation. (380 U.S., at 35). Here, however, the only interests which might conceivably be asserted to justify a denial of the right of self-representation, such as the desire to assure that the defendant in fact receives an adequate defense, are of no concern to the Government in its capacity "as a litigant." Moreover, the prosecutor in this case expressed no objection to the accused's being permitted to represent himself.

[14]See 380 U.S., at 35. The Court, after listing certain rights which the defendant could not waive without prosecutorial consent, described the waiver of counsel as a matter which "can be subjected to reasonable procedural regulations." *Id.*

> . . . . What were contrived as protections for the accused should not be turned into fetters. . . .
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> . . . . When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution. (Emphasis added).[15]

In any event, the right of self-representation in a system where counsel is the ultimate manager of the litigation is not bottomed solely upon an implied right to reject that which the right-to-counsel clause of the Sixth Amendment assures. It lies at the very core of due process as assured by the Fifth and Fourteenth Amendments. Due Process, both as understood through historical usage (see Section A, *infra*, at pp. 33-40), in the elaborations of this Court and by the weight of authority in the lower courts (see Section B, *infra*, at pp. 40-53), at a minimum forbids the State to deprive the defendant, by the compelled imposition of counsel, of the right to present his defense according to his own lights and to decide whether or not to exercise or waive those fundamental rights which the law affords him. Likewise, the right of a defendant to present his own defense is implicit in the provisions of the Sixth Amendment which secure "the accused" the right "to be confronted with the witnesses against him" and to "compulsory process for obtaining witnesses in his favor. . . ."

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[15] *See also Carter v. Illinois*, 329 U.S. 173, 174-75 (1946); *Price v. Johnston*, 334 U.S. 266, 285 (1948); *Moore v. Michigan*, 355 U.S. 155, 161 (1957).

A. The Historical Role and Right of Self-Representation.

In England prior to 1836, counsel were permitted to assist criminal defendants as of right only in misdemeanor and treason cases. J. GRANT, OUR COMMON LAW CONSTITUTION 5-10 (1960) (hereafter "GRANT"); W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-12 (1955) (hereafter "BEANEY"). The resulting practice was that persons accused of felonies were compelled to represent themselves.[16]

In colonial America, a theoretical right to the assistance of counsel was included in some early charters. Other colonies followed the English practice without substantial change. And, because of the scarcity of attorneys, the common practice was for persons accused of crime to represent themselves. GRANT, *supra* at 9-10; BEANEY, *supra* at 14-22. See also *People v. Sharp*, *supra*, 7 Cal.3d at 453-54; Comment: *The Right to Appear Pro Se: The Constitution and the Courts*, 64 J. CRIM. L. & CRIM. 240, 244 (1973) (hereafter *"The Right to Appear Pro Se"*). Although the right was rarely articulated (*The Right to Appear Pro Se*, *supra* at 244) the available historical evidence establishes that self-representation was more than a practice of the era; it was considered fundamental.

The need for a right of self-representation grew, in part, from the colonists' unfavorable association of lawyers with the British Crown. *The Right to Appear Pro*

[16]Some English judges permitted counsel to argue points of law raised by defendants. But the practice varied from case to case, and cannot be considered a right to counsel. See GRANT, *supra* at 5-6.

Se, supra at 245 n.67. The earliest colonial expression of the disdain for lawyers which made self-representation an essential right appears in *The Massachusetts Body of Liberties*, (1641): *A coppie of the liberties of the Massachusets Colonie in New England.* Article 26 provides:

> Every man that findeth himself unfit to please his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines. This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him.[17]

The colonial antipathy for lawyers which deprived them of the ability to collect fees for court appearances was reflected in virtually all of the colonies. *The Right to Appear Pro Se, supra* at 245. In West New Jersey, for example, Chapter XXII of the *Concessions and Agreements* (1677) provided that "no person or persons shall be compelled to fee any attorney or counciller to plead his cause, but that all persons have free liberty to plead his own cause, if he please . . . ."[18]

Similarly, in Pennsylvania, whose *Frame of Government* (1682) has been called "the most influential of the Colonial documents protecting individual rights,"

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[17]Reproduced in 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 71, 74 (1971) (hereafter "SCHWARTZ").

[18]SCHWARTZ, at 126,129 The subtitle of this document is "The Charter of Fundamental Laws, of West New Jersey, Agreed Upon." *Id.*, at 126.

Schwartz, supra at 130, it was expressly provided in Article VI of *The Laws Agreed Upon in England, &c.*:

> That, in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves; or, if unable, by their friends . . . .[19]

Inclusion of this provision by William Penn is particularly significant, for only twelve years earlier in his trial for inciting a riot by preaching in Grace Church Street without a permit[20] he and his co-defendant requested at the outset that the court "promise me a fair hearing, and liberty of making my defense."[21] The court granted Penn's request, and the jury ultimately acquitted him of any wrongdoing.[22]

The right of self-representation was reiterated by several colonies in the period immediately following the Declaration of Independence. Article IX of the *Pennsylvania Declaration of Rights* (1776) guaranteed, *inter alia*, "that in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council . . . ." SCHWARTZ, *supra* at 264, 265. The constitutions of Vermont (Article X, 1777) and New Hampshire (Article XV, 1783) contained virtually

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[19] *Id.*, at 140.

[20] *The Trial of William Penn*, 6 How. St. Tr. 951 (1670), *cited in Illinois v. Allen*, 397 U.S. 337, 351, 353 (1970) (Douglas, J., concurring).

[21] "The People's Ancient and Just Liberties Asserted, in the Trial of William Penn and William Mead, 1670," reproduced in SCHWARTZ, *supra* at 144, 147.

[22] *Id.*, at 153-54.

identical guaranties.[23] The *Georgia Constitution* (1777) in regulating the unauthorized practice of law, stressed that its provisions against unlicensed practitioners were "not intended to exclude any person from that inherent privilege of every freeman, the liberty to plead his own cause."[24]

Article IX of the *Pennsylvania Declaration of Rights* (1776) was again the model for other state constitutions when in 1792 Delaware adopted a provision that "in all criminal prosecutions the accused hath a right to be heard by himself and his counsel."[25] Georgia later adopted a provision which varied slightly, guaranteeing that "no person shall be detained from advocating or defending his cause before any court or tribunal, either by himself or counsel or both."[26]

These early expressions of the fundamental nature of the right to represent oneself *pro se* in criminal trials became the models for similar guarantees by most other states. Four state constitutions presently guarantee that an accused in a criminal prosecution shall have a right to be heard either by himself *or* by counsel *or both.*[27] Three others provide for the right to appear and defend

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[23]SCHWARTZ, *supra* at 323, 377.

[24]Article LVIII, *Id.*, at 291, 300.

[25]DELAWARE CONSTITUTION (1972) Article I, §7, quoted in BEANEY, *supra* at 20.

[26]GEORGIA CONSTITUTION (1798) Article III, §8, quoted in BEANEY, *supra* at 19.

[27]16 FLA. CONST. DECLARATION OF RIGHTS, §11 MISS. CONST. ART. 3, §26; TEX. CONST. ART. 1, §10; S.C. CONST. ART. 1, §18.

in person *or* by counsel.[28] Two more guarantee that an accused may be heard by himself, *and* counsel, *or either*.[29] Twenty-seven other state constitutions guarantee the right of the accused to be heard, or to defend in person, or by himself, *and* by counsel.[30] Hence, thirty-six states presently regard the right to self-representation as so fundamental as to require inclusion in their constitutions. The fundamental nature of the right to self-representation is thus firmly established by express recognition of the right in early American declarations of rights.

The absence of such express language in the Fifth and Sixth Amendments does not detract from the fundamental nature of the right. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1789), passed by

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[28]KAN. CONST. BILL OF RIGHTS, §10; MASS. CONST. PART 1, ART. 12; NEB. CONST. ART. 1, §11.

[29]ALA. CONST. ART. 1 §6; ME. CONST. ART. 1, §6.

[30]ARIZ. CONST. ART. 2, §24; ARK. CONST. ART. 2 §10; COLO. CONST. ART. 2. § 16; CONN. CONST. ART. 1, §8; DEL. CONST. ART. 1, §7; IDAHO CONST. ART. 1, §13; ILL. CONST. ART. 1, §8; IND. CONST. ART. 1, §13; KY. CONST. BILL OF RIGHTS, §11; MO. CONST. ART. 1, §18(a); MONT. CONST. ART. 3, §16; NEV. CONST. ART. 1, §8; N.H. CONST. BILL OF RIGHTS, ART. 15; N.M. CONST. ART. 2, §14; N.Y. CONST. ART. 1, §6; N.D. CONST. ART. 1, §13; OHIO CONST. ART. 1, §10; OKLA. CONST. ART. 2, §20; ORE. CONST. ART. 1, §11; PA. CONST. ART. 1, §9; S.D. CONST. ART. 6, §7; TENN. CONST. ART. 1, §9; UTAH CONST. ART. 1, §12; VT. CONST. CHAPTER 1, ART. 10; WIS. CONST. ART. 1, §7; WYO. CONST. ART. 1, §10; WASH. CONST. ART. 1, §22. See also, LA. CONST. ART. 1, §9.

the First Congress one day before Congress proposed the Sixth Amendment did expressly guarantee the right to self-representation to persons accused of crime in the federal courts. Section 35, now embodied in 28 U.S.C. §1654, provided:

> That in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.

The Court of Appeals for the Second Circuit has held:

> This statute gives more elaborate expression to the meaning of the terse language of the Bill of Rights and indicates, we think, that the Constitutional right to "assistance of counsel' was intended to include the right of defendants in criminal cases 'to plead and manage their own cases personally.'[31]

In addition to these express provisions for self-representation, the necessary effect of other procedural guarantees, granted in the absence of any right to assistance of counsel, assumes that the accused had the right to appear and defend in person. Article 8 of the *Virginia Declaration of Rights* (1776), for example, provided:

> That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent

[31] *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964).

> he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.[32]

Article VII of the *North Carolina Declaration of Rights* (1776)[33] contains similar procedural guarantees. Yet neither of these declarations provides for the right of assistance to counsel. Absent counsel, the procedural guarantees set forth above would be meaningless *unless* they were written on the assumption that an accused always has the right to represent himself.[34]

The procedural safeguards of the Fifth and Sixth Amendments were modeled, in part, on the language of the Virginia Declaration. Once again, the rights to trial by jury, to be informed of the nature of the accusation, to confront adverse witnesses, and to compel the attendance of favorable witnesses *assume* that the accused has a right to represent himself. Inclusion of the right to assistance of counsel in the Sixth Amendment is and was a supplement to the fundamental right to represent oneself. Aside from the common usage of "assistance", nothing we have discovered in the history of the right to counsel clause remotely suggests that this supplemental right was intended to or regarded as abrogating the right of self-representation.

In sum, the available historical data strongly indicates that the right of an accused to defend himself was, in

[32]Reproduced in SCHWARTZ, *supra* at 234, 235.

[33]SCHWARTZ, *supra* at 286, 287.

[34]As we argue hereafter, the Sixth Amendment's confrontation and compulsory process clauses in like fashion assume and imply a right of the accused to present his own defense. See pp. 41-42, *infra*.

colonial America and in 1789, a fundamental part of the Constitution's protections for those charged with crime.

B. Contemporary Constitutional Principles.

Our point of view may be simply stated at the outset. The guarantees of due process of law and the confrontation and compulsory process clauses of the Sixth Amendment mean, at bottom, that a defendant in a criminal case cannot be deprived of the opportunity to shape and present his defense according to his own lights. It is he who has the ultimate right to decide whether and in what fashion to defend against the charges, what evidence to present, whether to waive certain constitutional rights and defenses, whether to testify or not, and what affirmative defenses should be asserted. He is of course entitled to the assistance of counsel, and if he exercises that right can be deemed to have acceded to the customary allocation of decision making power which leaves to counsel the authority to make fundamental procedural choices. But the defendant cannot be compelled to accept counsel when to do so would, as a matter of local law, deprive him of the power to shape his defense and see it presented in whatever fashion he may desire.

It is almost unthinkable that due process could mean otherwise. It is the *defendant's* liberty and reputation which hang in the balance – not that of the judge, prosecutor or even defense counsel. And it is for *his* protection – and no one else – that each of the

components of due process, including those expressly guaranteed by the Bill of Rights, were designed.

This Court has never had occasion to describe due process in precisely these terms, but it is implicit in a host of decisions which give content to the phrase. For example, it has been long understood that a defendant has a right to be present at all pertinent stages of a criminal trial. *See, e.g., Hopt v. Utah,* 110 U.S. 574 (1884); *Schwab v. Berggren,* 143 U.S. 442 (1892); *Lewis v. United States,* 146 U.S. 370 (1882); *Dowdell v. United States,* 221 U.S. 325 (1892); *Diaz v. United States,* 223 U.S. 442 (1912); *Snyder v. Massachusetts,* 291 U.S. 97 (1934); *Illinois v. Allen,* 397 U.S. 337 (1970). The defendant has the right to present evidence (*e.g., Washington v. Texas,* 388 U.S. 14 (1967)) and to confront the witnesses against him (*e.g. Pointer v. Texas,* 380 U.S. 400 (1965)). He may personally take the stand and testify in his own behalf. See *Ferguson v. Georgia,* 365 U.S. 570, 598, 601 (1961) (concurring opinions). Plainly the latter right can be exercised only by the defendant; and the right to be present has meaning only on the assumption that he will have a role to play beyond that of interested spectator.[35]

The right of an accused to have *his* defense presented as *he* sees fit is not found solely in generalized principles of due process. It is implicit in the Sixth Amendment itself – not simply as a right to waive the right to

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[35]Moreover, as previously noted, the courts require that the exercise or waiver of certain fundamental rights – the right to jury trial and the right to testify – are matters as to which the defendant's wishes are controlling irrespective of the views of counsel. See note 4, *supra.*

counsel, but rather in the confrontation and compulsory process clauses. The Sixth Amendment expressly guarantees "*the accused*" the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Thus while the right of a defendant to be present was originally treated by the Court as a fundamental aspect of due process (*see, e.g., Schwab v. Berggren, supra*), Mr. Justice Black's opinion for the Court in *Illinois v. Allen, supra,* referred to the "Sixth Amendment right to be present." (*Id.*, at 342) The view that the right to be present derives from the confrontation and compulsory process clauses is extremely significant. If the defendant's Sixth Amendment rights to present and challenge evidence could be satisfied by allowing his counsel to exercise them on his behalf, the defendant's absence from the courtroom while his counsel remained would be insignificant, and the right to be present a little more than an empty formalism. Plainly the Sixth Amendment contemplates a more meaningful rule for the defendant. Thus Justice Cardozo, writing for the Court in *Snyder v. Massachusetts, supra,* explained the right to be present as involving the right of the defendant "to give advice or suggestions *or even to supersede his lawyers altogether and conduct the trial himself.*" *Id.*, at 106 (emphasis added).

In the majority of cases, the defendant will be content to appear with counsel and to permit his attorney to present the defense. Thus what *Powell* and *Gideon* contemplate will ordinarily occur and the goal of assuring due process will be furthered. But where the relationship of trust and confidence between lawyer and client does not exist because the relationship is coerced, then the

necessary consequences of representation become intolerable. The defendant then has a spokesman in whom he may have no confidence, in whom he may be unwilling to confide and who, in any event, is undesired by him. To make matters worse, his counsel will conduct the defense according to *his* judgment. Vital decisions concerning motions to be made, which witnesses will be called and which will not, the shape and theory of the defense, and a host of other fundamental matters, will be made by counsel. Although counsel may consult with his client with respect to each of these decisions, he is neither obligated to do so nor to conduct the defense as the client desires.[36] Without the willing cooperation and trust of his client, the benefits a lawyer can provide rapidly diminish.

In this setting, the vital principle of *Powell* and *Gideon* has no application. The right of an accused to decline counsel and to present his own defense becomes a safety valve of fundamental importance. It rests, as the Court of Appeals for the Second Circuit has recognized, "on two bases":

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[36]Disputes between client and counsel will, for obvious reasons, frequently not appear on the record. This is so in the present case. For example, petitioner advises his present counsel that he and the deputy public defender appointed to represent him did not agree on the desirability of calling a witness, one Charles Cunningham, and that the attorney refused to make the necessary efforts to locate this witness. As previously stated (see note 1, *supra*, the refusal of counsel to locate and call this witness was originally asserted by petitioner as an issue for consideration in this Court, but an examination of the record indicates that the record does not fully reveal pertinent facts. The matter does, however, at least illustrate the kinds of difficulties which arise when an accused is compelled to be represented by counsel against his will.

> [The accused] "must have the means of presenting his best defense," and to this end he "must have complete confidence in his counsel." Without such confidence a defendant may be better off representing himself. Moreover, even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice "with eyes open."[37]

The Court of Appeals for the District of Columbia has recently elaborated upon the second of these two distinct themes:

> [A] salient aspect of the *pro se* right, in our view, is directed to considerations distinct from the objective of achieving what would be the best result in the litigation from the lawyer's point of view. As the Supreme Court said in Adams v. United States ex rel. McCann, *supra*, 317 U.S. at 279, 63 S.Ct. at 241, the "right to dispense with a lawyer's help . . . rest[s] on considerations that go to the substance of an accused's position before the law." It is designed to safeguard the dignity and autonomy of those whose circumstances or activities have thrust them involuntarily into the criminal process. An accused has a fundamental right to confront his accusers and his "country," to present himself and his position to the jury not merely as a witness or through a "mouthpiece," but as a man on trial who elects to plead his own cause. He is not obliged to seek what counsel would record as a victory but what he sees as tantamount to condemnation or doubt rather than vindication. A defendant has the moral right to stand alone in his hour of trial. The

[37] *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2nd Cir. 1965), *cert. den.*, 384 U.S. 1007 (1966).

denial of that right is not to be redeemed through the prior estimate of someone else that the practical position of the defendant will be enhanced through representation by another, or the subsequent conclusion that the defendant's practical position has not been disadvantaged.

. . . . Even if the defendant will likely lose the case anyway, he has the right – as he suffers whatever consequences there may be – to the knowledge that it was the claim that he had put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.[38]

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[38] *United States v. Dougherty*, 473 F.2d 1113, 1128 (D.C. Cir. 1972). See also Comment, *The Right to Appear Pro Se: The Constitution and the Courts*, 64 J. CRIM. L. & CRIMINOLOGY 240, 247 (1973):

> Due process is involved only marginally with who wins or who loses; its primary focus is on how the accused was brought to trial and how his case was tried. The judicial system's credibility depends on this. Crucial to this credibility is the defendant's own determination of his defense, *i.e.*, his trial strategy, his theory of defense, his decision whether or not to take the witness stand. The choice should be left to him because he has the most to lose if the choice is wrong and the community-at-large must not be allowed to believe that the fate of an accused was sealed before trial began due to government dictation as to methods of defense. The same due process considerations that allow a defendant to choose his defense also require that he be allowed the choice of representing himself. Without this right of choice, the defendant becomes a mere spectator at his trial, his destiny to be decided by a system over which others exercise complete control.

These considerations have prompted a clear majority of courts and commentators to find the right to defend *pro se* secured by the United States Constitution. Although the right in federal prosecutions is also conferred by federal statute (28 U.S.C. § 1654), the Second,[39] Third,[40] Fifth,[41] Sixth,[42] Seventh,[43] Eighth,[44] and Ninth[45] Circuits have found the right of self-

[39] *United States v. Plattner*, 330 F.2d 271 (2d Cir. 1964); *United States ex rel. Maldonado v. Denno*, 348 F.2d 12 (2d Cir. 1965), cert. den., 384 U.S. 1007 (1966).

[40] *United States v. Washington*, 341 F.2d 277, 285 (3rd Cir. 1965) *cert. den.*, 382 U.S. 850 (1966). While the court's opinion in *Washington* does not explicitly invoke the constitution, its entire discussion, especially the citation of *United States v. Redfield*, 197 F.Supp. 559 (D. Nev.), *aff.'d per curiam*, 295 F.2d 249 (9th Cir. 1961) *cert. den.*, 369 U.S. 803 (1962) leaves little doubt that the right to defend *pro se* was viewed as of constitutional dimension.

[41] *MacKenna v. Ellis*, 263 F.2d 35 (5th Cir.), *cert. den.*, 360 U.S. 935 (1959).

[42] *United States v. Johnson*, 333 F.2d 1004 (6th Cir. 1964); *United States v. Sternman*, 415 F.2d 1165, 1169-70 (6th Cir. 1969) *cert. den.*, 397 U.S. 907 (1970); *United States v. Condor*, 423 F.2d 904, 907-08 (6th Cir. 1970).

[43] *Lowe v. United States*, 418 F.2d 100, 103 (7th Cir. 1969), *cert. den.*, 397 U.S. 1048 (1970).

[44] *United States v. Warner*, 428 F.2d 730, 733 (8th Cir.1970), *cert. den.*, 400 U.S. 930 (1970); but see *Butler v. United States*, 317 F.2d 249 (8th Cir.), *cert. den.*, 375 U.S. 838 (1963) (concluding that right purely statutory).

[45] *Reynolds v. United States*, 267 F.2d 235 (9th Cir. 1959) (per curiam); *Bayless v. United States*, 381 F.2d 67, 71 (9th Cir. 1967); *Arnold v. United States*, 414 F.2d 1056, 1058 (9th Cir. 1969) *cert. den.*, 396 U.S. 1021 (1970); *Haslam v. United States* 431 F.2d 362, 365 (9th Cir. 1970) *cert. den.*, 402 U.S. 976 (1971).

representation to be of constitutional dimension.[46] The great weight of scholarly commentary is the same effect.[47] Likewise, the preponderance of state courts

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[46]The Tenth Circuit, by contrast, has referred to the right as derived from the statute (*Van Nattan v. United States*, 357 F.2d 161 (10th Cir. 1966) while the District of Columbia Circuit, which previously appeared to view the right as merely statutory (see *Brown v. United States*, 264 F.2d 363 (D.C. Cir.), *cert. den.*, 360 U.S. 911 (1959)) now considers the issue open in that Circuit. See *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

[47]Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479 (1971) (hereafter cited as "*Self-Representation*") is the most frequently cited. See also Note, *The Right of An Accused to Proceed Without Counsel*, 49 MINN. L. REV. (1965), Note, *The Right to Defend Pro Se*, 3 TEX. TECH. L. REV. 89 (1971); Comment, *Jury Nullification and the Pro Se Defense: The Impact of Doughterty v. United States*, 21 KAN. L. REV. 48 (1972); Comment, *People v. Sharp: Death Knell For Pro Se Representation in Criminal Trials in California?* 24 HAST. L.J. 431 (1973); Note, *Where is the Constitutional Right to Self Representation and Why is the California Supreme Court Saying All Those Terrible Things About It?*, 10 CALIF. WESTERN L. REV. 196 (1973); Comment, *The Right to Defend Pro Se in Criminal Proceedings*, 1973 WASH. U. L. Q. 679 (1973); Comment, *The Right to Appear Pro Se: The Constitution and the Courts*, 64 J. CRIM. L. & CRIMINOLOGY 240 (1973).

Articles to the contrary are *Grano, The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); Note, *Criminal Procedure – Right to Defend Pro Se*, 48 N. CAR. L. Rev. 678 (1970).

respect the right to defend *pro se*, variously on state law and federal law grounds.[48]

The fundamental importance of the right of an accused "personally to manage and conduct his own defense in a criminal case" (*United States v. Plattner, supra*, note 39, at 274) may unfairly be denigrated if one perceives those seeking to exercise that right as bent upon converting our courtrooms into political forums or inclined to disruption of orderly judicial proceedings. The available evidence suggests far more conventional motives on the part of those seeking to present their own defense – motives which, indeed, largely reflect the enormous power

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[48] *See, e.g., State v. Capetta*, 216 So.2d 749 (Fla. 1968), *cert. den.*, 394 U.S. 1008 (1969); *Lockhart v. State*, 92 Idaho 813, 451 P.2d 1014 (1969); *People v. Nelson*, 47 Ill. 2d 253, 268 N.E. 2d 2 (1971); *Blanton v. State*, 229 Ind. 701, 98 N.E. 2d 186 (1951); *Westberry v. State*, 254 A.2d 44 (Me. 1969); *Allen v. Commonwealth*, 324 Mass. 558, 87 N.E. 2d 192 (1949); *People v. Haddad*, 306 Mich. 556, 11 N.W. 2d 240 (1943); *State v. McGhee*, 184 Neb. 352, 167 N.W.2d 765 (1969); *Zasada v. State*, 19 N.J. Super. 589, 89 A.2d 45 (1952); *People v. McLaughlin*, 291 N.Y. 480, 53 N.W. 2d 356 (1944); *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972); *State v. Verna*, 9 Ore. App. 620, 498 P.2d 793 (1972); *State v. Tomlinson*, 78 S.D. 235, 100 N.W.2d 121 (1960); *State v. Penderville*, 2 Utah 281, 272 P.2d 195 (1954); *State v. Woodall*, 5 Wash.App. 901, 491 P.2d 680 (1971). *But cf. People v. Kirkland*, 40 Mich.App. 22, 198 N.W.2d 811 (1972) (distinguishing *People v. Haddad, supra*).

reposed in counsel once a defendant accepts representation by an attorney.[49]

The instances in which a defendant seeks to represent himself for what might be viewed as "political" considerations are few. Only one of the reported[50]

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[49]An additional factor which may impel some defendants to waive counsel is financial. A defendant whose resources are slightly in excess of the indigency line may fear the ecomonic burdens which would be imposed if counsel is retained. And in some jurisdictions the indigent defendant may face liability under a recoupment statute of the kind upheld in *Fuller v. Oregon*, ___ U.S. ___, 40 L.Ed. 2d 642 (1974). California has a similar provision, which provides that if the trial court finds the defendant has a "present ability to pay all or part of the cost" of counsel it shall order him to reimburse the county "in any installments and manner which it believes reasonable and compatible with his financial ability." CALIF. PEN. CODE §987.8. The constitutionality of the section was recently upheld by the Supreme Court of California. *People v. Amor*, ___ Cal. 3d ___, ___ Cal. Rptr. ___, ___ P.2d ___ (Crim. 17473, decided July 9, 1974).

[50]The recent unreported trial in Santa Clara County, California of Angela Davis is sometimes incorrectly cited as an illustration of a defendant seeking self-representation for "political" reasons. She sought, and was granted, the right to act as her own co-counsel. The reasons given by her, which evidently were persuasive to the trial judge, stressed a desire to participate in the defense process in a conventional way:

> I am not talking about trying to create a political forum in this courtroom; I am not talking about making irrelevant political remarks; I'm talking about being able to make arguments, being able to make motions, objections, and being able to examine witnesses when it becomes clear that I am the most competent person in the legal team to do so.

Quoted in *Self-Representation*, at 1506. Defendant Davis was acquitted following a trial in which her participation, by all accounts, was orderly and entirely in line with her representations to the trial court.

California decisions even remotely involves this factor.[51] The bulk of the cases involve expressions of a belief by the defendant that he, and not a lawyer, is the best person to present all or part of the defense. There is evidence that a high percentage of those seeking to present their own defense do so out of a strong belief in their own innocence. See *The Right to Appear Pro Se*, at 248 & n.110. Many defendants express a lack of confidence in counsel; in some instances, this mistrust is directed at lawyers generally, and in others at the particular attorney assigned by the court or by the public defender's office to represent the accused. See *The Right to Appear Pro Se, supra* at 248 & n.111, n.113; Appendix A; *Self-Representation*, at 1499-1502. That was Petitioner's motivation in seeking to represent himself. He expressed concern because the public defender's office was "very loaded down with its, you know, a heavy case load." (A. 35).

The point, of course, is not that the defendant's perceptions in every instance are correct or even reasonable; many court appointed attorneys and public defenders are highly competent and dedicated. It is not our purpose to question the assumption of *Powell* and

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[51]In an Appendix to this Brief, we have summarized the reported California cases involving the right of self-representation for the purpose of indicating the reasons given by the accused and other pertinent facts. This analysis is hereafter cited as "Appendix A." The one case involving a motive for self-representation which some might view as "political" is *People v. Marcus*, 133 Cal. App. 2d 579 284 P.2d 848 (1955).

Another attempt to determine the circumstances and motives leading to demands for self-representation was made in Illinois by inquiry of 99 trial judges. *The Right to Appear Pro Se*, note 47, *supra*.

Gideon that representation by counsel is fundamental to the fair trial of a defendant who desires representation. But regrettably there is ample evidence that less than diligent representation in this nation's criminal courts is far from a freakish exception. Serious concerns recently have been expressed by The Chief Justice (see Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice?*, 42 FORD. L. REV. 227 (1973)), who suggests as a "working hypothesis that from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation."

In many communities, the public defender provides a generally high level of representation, at least for serious offenses. In others, however, the public defender is burdened with a crushing caseload. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: THE COURTS 55-56 (1967). And where public defender offices do not exist or, as in the District of Columbia, are inadequately staffed to meet the needs of all defendants, systems for appointing private counsel produce uneven results. See *United States v. Chatman*, D.C. Super. Ct., Crim. No. 28539-74, decided May 7, 1974, 42 U.S.L. Week 2593 (1974).

In many communities, a large proportion of criminal cases are defended by lawyers whose office is the local criminal court and whose practice is operated on "a mass production basis." TASK FORCE REPORT, at 32. They have recently been characterized as "a cadre of mediocre lawyers who wait in the courtroom in the hopes of

receiving an appointment" and have "more expertise at extracting a fee . . . than in defending a criminal case." ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (app. draft 1971). As the President's Commission on Law Enforcement and the Administration of Justice put it:

> In many lower courts defense counsel do not regularly appear, and counsel is either not provided to a defendant who has no funds; or, if counsel is appointed, he is not compensated. The Commission has seen, in the "bullpens" where lower court defendants often await trial, defense attorneys demanding from a potential client the loose change in his pockets or the watch on his wrist as a condition of representing him. Attorneys of this kind operate on a mass production basis, relying on pleas of guilty to dispose of their caseload. They tend to be unprepared and to make little effort to protect their clients' interests.
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> * * * *
>
> Few in number, these lawyers typically carry large case loads and in many cities dominate the practice in routine cases. They frequent courthouse corridors, bondsmen's offices, and police stations for clients, and rely not on legal knowledge but on their capacity to manipulate the system. Their low repute often accurately reflects the quality of services they render.[52]

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[52]THE CHALLENGE OF CRIME IN A FREE SOCIETY, 29, 152 (1967). See also Grano, note 47, *supra*, at 1197-98; Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289, 306-09 (1964); Oakes and Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 UNIV. OF ILL. L. FORUM 584, 693 (1966).

Of course relief is available, by appellate review or in post-conviction proceedings, for extreme cases of ineffective representation. See Part I, *supra*, at pp. 23-24. But what answer does our system have for the defendant whose counsel was inept but whose representation was not so grotesque that the trial was "reduced . . . to a 'farce or a sham' "?[53] Those defendants who know best the answer to that question frequently seek to conduct their own defense.

It should be stressed, however, that the right of an accused to conduct his own defense ought not to turn on whether his negative perceptions of the quality of counsel available to him are correct or even debatable. The judgment of the accused may, viewed objectively, be unfair. The counsel he spurns may be highly dedicated and competent. The point is that the defendant *has* those perceptions, and they are unlikely to be diminished if the outcome is a conviction. Thus there is practical wisdom in the observation of the Second Circuit, quoted earlier, that "even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and choose 'with eyes open.' " *United States ex rel. Maldonado v. Denno, supra*, at 15.

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[53] *People v. Ibarra*, 60 Cal.2d 460, 464, 34 Cal.Rptr. 863, 386 P.2d 487 (1963).

III.

THERE ARE NO CONSIDERATIONS OF JUDICIAL ADMINISTRATION WHICH WARRANT NON-RECOGNITION OF THE RIGHT OF SELF-REPRESENTATION.

It is sometimes suggested that recognition of a right to defend *pro se* presents a dilemma:

> If the court denies the defendant the right, it has provided the defendant grounds for appeal in that he was denied his constitutional right to self representation. If the court grants the motion to proceed *pro se*, it may have provided the clever defendant with an opportunity to lay grounds for appeal on a claim of denial of fair trial because the defense which he conducted was inadequate and incompetent.[54]

The answer to this "dilemma" is that it does not exist. A defendant who represents himself is not entitled to privileges or indulgences other than those enjoyed by counsel or other defendants represented by counsel. See *Self-Representation, supra,* at 1496. He does not "acquire the right to have the court act as his counsel whenever he seem[s] to be blundering." *Burnstein v. United States,* 178 F.2d 665, 670 (9th Cir. 1949); see also *Michener v. United States,* 181 F.2d 911, 918 (8th Cir. 1950). As the California Supreme Court has said, the *pro se* defendant "assumes for all purposes connected with his case, and must be prepared to be treated as having, the

[54]Note, *Where is the Constitutional Right to Self Representation and Why is the California Supreme Court Saying All Those Terrible Things About It?,* 10 CALIF. WEST. L. REV. 196, 209 (1973).

qualifications and responsibilities concomitant with the role he has undertaken." *People v. Mattson*, 51 Cal.2d 777, 794, 336 P.2d 937 (1959). All that is required, then, is that the trial court act with care to ensure that the defendant who asks to represent himself knowingly and intelligently has waived his right to counsel (see Part IV, *infra*); that having been accomplished, the *pro se* defendant will not be heard to complain of the quality of his own performance.[55]

Moreover, nothing in the Constitution *prevents* trial judges from taking steps to ensure that a *pro se* defendant receives a trial which is, measured by objective standards, procedurally correct. Although trial judges are not required to assist a *pro se* defendant, "it is common practice in both civil and criminal trials for trial judges, by advice and suggestion, to assist persons who represent themselves." *People v. Redmond*, 71 Cal.2d 745, 758, 79 Cal.Rptr. 529, 457 P.2d 321 (1969); see also *United States v. Odom*, 423 F.2d 875, 877 (9th Cir. 1970) (commenting on care taken by trial judge to protect rights of *pro se* defendant).

Similarly, the trial court may appoint "standby counsel" to provide such assistance as the defendant may need and want. *See, e.g., United States v. Spencer*, 439 F.2d 1047, 1051-52 (2d Cir. 1971); *Bayless v. United States*, 381 F.2d 67, 71 (9th Cir. 1967); *Brown v. United States*, 264 F.2d 363, 369 (D.C. Cir. 1959) (Burger, J., concurring opinion), *cert. den.*, 360 U.S. 911

[55]We know of no case which grants the defendant relief on the ground that his representation of himself was incompetent. Surely courts would reject such claim unhesitatingly, for a defendant can be bound by the consequences of his knowing and intelligent acts. *Cf. North Carolina v. Alford*, 400 U.S. 25 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

(1959). That procedure has long been available in California (see *People v. Carter*, 66 Cal. 2d 666, 671; *People v. Mattson*, 51 Cal. 2d 777, 794 (1959)), and is highly desirable. See *Mayberry v. Pennsylvania*, 400 U.S. 455, 467-68 (1971) (Burger, C.J., concurring); AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE §6.7 (App. Draft 1972):

> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his own motion. Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.[56]

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[56]The Commentary to §6.7 states:

> Once the judge has . . . permitted an accused to appear *pro se*, he should not foist a lawyer on the accused by permitting standby counsel to examine and cross-examine witnesses or make arguments over defendant's objection. Nonetheless, in all but the simplest trials, and perhaps even in those if availability of counsel permits, the court should ordinarily appoint standby counsel to assist the accused if and when called upon, and to perform the very limited independent role contemplated by this standard. [citation]. Normally, of course, the accused will very quickly recognize the value of counsel and will consent to being represented by the standby. Before effecting the change in roles, however, it would be wise for the judge to explain to the defendant that if he accepts the standby as his counsel, the lawyer and not the accused will conduct the defense thereafter . . . .

(footnote continued on next page)

It remains only to say that respect for the right of the accused to conduct his own defense in no way requires trial courts to tolerate abuse of the right by disruptive conduct. A defendant, no less than a lawyer, is entitled to conduct the defense forcefully and effectively; but defendant and counsel alike must observe the requirements of courtroom protocol. Reported instances of disruption by defendants allowed to represent themselves are rare.[57] But for those who do not conform their demeanor to the requirements of the court there are swift and effective remedies. The power of contempt, exercised in conformity with the requirements of due process (see *Mayberry v. Pennsylvania, supra*), is one remedy; termination of the right of self-representation is another (see *United States v. Dougherty*, 473 F.2d 1113, 1125 (D.C. Cir. 1972)); and in extreme cases the defendant may be removed from the courtroom. *Illinois v. Allen*, 397 U.S. 337 (1970).

Id., at 87. The role contemplated by the ABA Project thus is somewhat more circumscribed than that suggested by The Chief Justice in *Mayberry v. Pennsylvania, supra*, in which it was proposed that standby counsel "perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence, and making closing argument." 400 U.S., at 467-68.

[57] *Mayberry v. Pennsylvania*, is of course the best known exception; and as that decision makes clear courts are not without remedy for such instances. That *Mayberry* is indeed the exception and not the rule appears clearly after an examination of all of the reported California self-representation cases. We have found *no* cases of defendants who, having been allowed to defend *pro se*, abused the right and engaged in courtroom disruption. See Appendix A.

There is, as noted, little reason to fear that permitting defendants to conduct their own defense will generate problems of this nature, for there is no evidence from the experiences of the federal courts or the state courts which respect the right of self-representation that disruption is a significant factor. See note 57, *supra.* Doubtless most defendants who seek to plead their own cause are sincere in their actions and wisely perceive that, as The Chief Justice has said, "the rules of professional manners and professional etiquette . . . are essential for effective trial advocacy." Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice,* 42 FORD. L. REV. 227, 235 (1973).

The right of an accused to conduct his own defense is therefore not inconsistent with the sound and orderly administration of justice. Yet while the arguments which some have made in justification for denial of that right are frequently overdone, doubtless the *pro se* defendant imposes some extra burdens upon the system of justice. We submit those burdens are tolerable, and amply justified by considerations of fundamental fairness:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.[58]

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[58] *Stanley v. Illinois,* 405 U.S. 645, 656 (1972).

IV.

A DEFENDANT SHOULD NOT BE DENIED THE RIGHT OF SELF-REPRESENTATION IF TIMELY ASSERTED UNLESS HIS WAIVER OF THE RIGHT TO COUNSEL IS NOT KNOWING AND INTELLIGENT.

Exercise of the right to defend *pro se* often[59] involves a relinquishment of the Sixth Amendment right to the assistance of counsel. Where the trial court does not intend to appoint standby counsel,[60] then it must

[59]We use the word "often" advisedly, for it is possible and common for a defendant to proceed *pro se*, while receiving such "assistance" from standby counsel as he desires. See pp. 55-56, *supra*. That would surely satisfy the requirements of the Sixth Amendment. Thus it is not correct to state, as some have, that the right to defend *pro se* and to enjoy the assistance of counsel "cannot be both exercised at the same time." *United States v. Mitchell*, 137 F.2d 1006, 1010 (2nd Cir. 1943) *cert. den.*, 321 U.S. 794 (1944).

[60]Whether a defendant who wishes to defend *pro se* has a constitutional entitlement to the appointment of a standby counsel is a question not presented on this record. Petitioner Faretta did not demand the assistance of counsel and unequivocally waived that right on the record. See A. 39-40. The weight of authority appears to be that a defendant who exercises his right to defend *pro se* is not also entitled the appointment of a standby counsel. *See, e.g., United States v. Mitchell, supra; United States v. Private Brands, Inc.* 250 F.2d 554, 557 (2d Cir. 1957) *cert. den.*, 355 U.S. 957 (1958); *Duke v. United States*, 255 F.2d 721, 725 (9th Cir. 1958) *cert. den.*, 357 U.S. 920 (1958); *Brasier v. Jeary*, 256 F.2d 474, 476 (8th Cir. 1958) *cert. den.*, 358 U.S. 867 (1958); *Shelton v. United States*, 205 F.2d 806, 813 (5th Cir.), petition for cert. *dismissed on petitioner's motion*, 346 U.S. 892 (1953), *motion to vacate denied*, 349 U.S. 943 (1955). This is the view of the California Supreme Court. *People v. Mattson*, 51 Cal.2d 777, 336 P.2d 937 (1959). As suggested earlier, the appointment of standby counsel, even if not constitutionally compelled, is highly desirable.

determine whether the defendant's waiver meets the *Johnson v. Zerbst* standard of an "*intentional* relinquishment or abandonment of a *known* right or privilege." 304 U.S. 458, 464 (1938) (emphasis added). This Court has characterized the issue as whether the defendant "knows what he is doing and [whether] his choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942). A trial judge will, of course, be required to "investigate as long and as thoroughly as the circumstances of the case before him demand" (*Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948)) to be sure that the defendant understands that he is entitled to counsel and knowingly and intelligently chooses to waive that right. The Court of Appeals in *United States v. Plattner*, 330 F.2d 271, 276 (2d Cir. 1964) aptly described the proper and necessary inquiry:

> [I]t is incumbent upon the presiding judge, by recorded colloquy with the defendant, to explain to the defendant: that he has the choice between defense by a lawyer and defense *pro se;* that, if he has no means to retain a lawyer of his own choice, the judge will assign a lawyer to defend him, without expense or obligation to him; that he will be given a reasonable time within which to make the choice; that it is advisable to have a lawyer, because of his special skill and training in the law and that the judge believes it is in the best interest of the defendant to have a lawyer, but that he may, if he elects to do so, waive his right to a lawyer and conduct and manage his defense himself. If the result is a waiver of the right to counsel and an election to defend *pro se*, the presiding judge should conduct some sort of inquiry bearing upon the defendant's capacity of making an intelligent choice. In other words, there

must be a record sufficient to establish to our satisfaction that the defendant "knows what he is doing and his choice is made with eyes open."[61]

The issue, however, is not whether the defendant is a skilled trial advocate or learned in the law. That was the view of the trial court in this case, which quizzed petitioner Faretta at great length concerning his knowledge of the exceptions to the hearsay rule, the number of available challenges to jurors and the grounds for challenge, and related matters. A. 46-48), quoted at pp. 7-9, *supra*. The trial court's dissatisfaction with petitioner's answers was the sole basis, so far as the record discloses, for its conclusory finding that Faretta did not make "an intelligent and knowing waiver of his constitutional right to be represented by an attorney." (A. 48).[62] Unless the right to defend *pro*

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[61]A model dialogue between trial judge and defendant has been suggested by Judge Ely in *Hodge v. United States*, 414 F.2d 1040, 1048-49 note E (9th Cir. 1969) (dissenting opinion), and is reproduced here in Appendix B. While the majority of that court evidently did not view it as constitutionally required, presumably any trial judge who observed that or a like procedure will have made a record unlikely to be questioned.

[62]The trial judge left little doubt that the cause for the reversal of its prior order allowing petitioner to defend *pro se* was the intervention of the decision of the California Supreme Court in *People v. Sharp*, 7 Cal.3d 448, 103 Cal.Rptr. 233, 499 P.2d 489 (1972) *cert. den.*, 410 U.S. 944 (1973). *Sharp* was decided on July 7, 1972; the order revoking petitioner's *pro se* status was made six days later on July 13, 1972. The trial court expressly acknowledged that *Sharp* influenced its decision. (A. 48).

se can be made contingent upon the ability of the accused to pass an informal examination regarding his legal skills, there can be no question that the trial judge erred, for there would have been no basis on the record for concluding that petitioner lacked a full appreciation for his right to counsel and the consequences of waiving it.

As the Ninth Circuit put it in *Hodge v. United States*, 414 F.2d 1040, 1043 (9th Cir. 1969) (en banc):

> The question before the judge was not whether the defendant was professionally capable of acting as his own lawyer. Few defendants are, and the right of self-representation is not so conditioned. The question was simply whether the defendant understood the charges against him and was fully aware that he would be on his own in a complex case area where experience and professional training are greatly to be desired.[63]

Accordingly, when the defendant prior to trial[64] makes a request for leave to defend *pro se*, the trial

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[63]See also *Self-Representation*, *supra*, 1495-96 n.100 and authorities cited.

[64]This case does not present for decision the question of whether a defendant who does not seek to defend *pro se* until trial has commenced may be denied that right in the discretion of the trial court. That he may seems to be the prevailing view. See *Self-Representation*, *supra*, at 1485 & n.44, and authorities cited. We confess the some difficulties with the distinction, at least in the severity with which it has been drawn. We certainly do not contend that recognition of the right to defend *pro se* as petitioner urges here would mechanically result in a requirement that the right be recognized whenever asserted. The Court has said that courts "may attach reasonable time limitations to the assertion of federal constitutional rights." *Michel v. Louisiana*,

court must permit him to do so unless, after careful inquiry, it is unable to say that the defendant has truly made the choice "with eyes open."

V.

DENIAL OF THE RIGHT OF SELF-REPRESENTATION REQUIRES REVERSAL.

The Court acknowledged in *Chapman v. California*, 386 U.S. 18, 23 (1967) that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." It

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350 U.S. 91, 97 (1956). *See, e.g., Davis v. United States*, 411 U.S. 233 (1973) (challenge to grand jury selection must be made prior to trial). However, the denial of the right to defend *pro se* seems particularly harsh when it is asserted by a defendant as a result of a bona fide conflict with trial counsel over matters of trial strategy. Where the defendant shows that the disagreement did not exist until after commencement of trial and where counsel insists (as the authorities cited in Part I, *supra*, suggest he may) that his view prevail, then denial of the right to proceed *pro se* seems to us difficult to defend.

We believe a fair balance can be struck between the interests of dedendants who, after trial commences, legitimately assert for the first time the right to defend *pro se*, on the one hand, and the interests of the prosecution and trial court on the other. Where no justification for the delayed assertion is given, presumably it may be denied. Moreover, where the defendant is permitted to proceed *pro se* in mid-trial, the court is under no obligation to grant a continuance or otherwise delay the proceedings. *See, e.g., United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 16 (2d Cir. 1965), *cert. den.*, 384 U.S. 1007 (1966).

gave as examples the decisions establishing the right to counsel, the prohibition against use of a coerced confession, and the right to an impartial judge. See *id.*, at n.8. Plainly no defendant, however overwhelming the evidence of guilt, can be convicted without counsel or by a biased judge. For much the same reason, application of the harmless error rule would be wholly inappropriate in the context of the right to self-representation.[65] As we have shown, the right to defend *pro se* derives not merely from the need to provide the most reliable fact-finding process; equally at issue is the question of the fundamental fairness of a process which denies the defendant, whose liberty is at stake, the right to control the presentation of his defense if he so chooses. There simply could never be a denial of the right of self-representation which is, in that sense, "harmless." See *United States v. Plattner, supra,* at 273.

Moreover, as the Court of Appeals recognized in *United States v. Dougherty,* 473 F.2d 1113, 1148 (D.C. Cir. 1972), "if the conventional doctrine of harmless error is applied, it will in effect undercut the right of *pro se* representation, since rarely if ever can there be a showing of prejudice in terms of result from the conduct of a trial by counsel." Rejecting the harmless error approach, the Court of Appeal concluded that

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[65]The question of harmless error, of course, is entirely distinct from the issue of retroactivity, an issue we have not addressed inasmuch as petitioner, the first litigant to bring the issue to this Court, is in all events entitled to the benefits of any decision the Court may render. See *Stovall v. Denno,* 388 U.S. 293, 301 (1967).

"the defendant is entitled to a trial at which he is accorded his right to represent himself." *Id.*

CONCLUSION

Petitioner, whose capacity freely and intelligently to waive the right to counsel cannot fairly be disputed, was denied the right to defend *pro se.* As a consequence, he was convicted following a trial at which he was represented by a counsel he did not choose nor desire. The right to defend *pro se* is a fundamental ingredient of due process, and its denial to petitioner requires that the judgment below be reversed.

Dated: July 19, 1974

Respectfully submitted,

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APPENDIX A

ANALYSIS OF REPORTED CALIFORNIA CASES INVOLVING THE RIGHT OF SELF-REPRESENTATION

This Appendix reflects an analysis of every reported California appellate decision involving the right of self-representation.* Our purpose was to examine the cases to determine the reasons expressed by defendants for seeking to defend *pro se* and to see if there were grounds for the occasionally expressed concern that the right of self-representation is most frequently asserted in "political" cases and that disruptive, obstructive conduct by the *pro se* defendant is a common phenomenon. It will be noted that in a high percentage of the cases the defendant was allowed to represent himself which reflects the pre-*Sharp* California rule recognizing the right. See Brief, note 2, *supra.*

Scrutiny of the reported decisions brings three points into sharp focus. *First,* the typical explanation given by

*Every case cited in the annotated statutes under Article I, Section 13 of the California Constitution and Section of the California Penal Code in the subsections dealing with self-representation in criminal trial proceedings has been examined. While there may be a small number of cases overlooked by the editors of the annotated statutes, so far as we can determine this Appendix is exhaustive and certainly presents a fair picture of the right of self-representation insofar as it emerges from the reported decisions. We have excluded the few self-representation cases involving appeals and post-conviction proceedings. We have also excluded a few cases in which the defendant did not object to having counsel handle the case generally but who simply sought to speak at one point in the proceedings.

the defendant seeking to present his own defense is dissatisfaction with his counsel (typically the public defender or appointed counsel) and even an express disagreement over trial strategy. *Second,* of the 76 cases which were examined, only one could remotely be regarded as involving a "political" motivation underlying the defendant's desire to defend himself.* *Third,* in *none* of the 44 cases in which the defendant was permitted to defend himself was there any disruptive or obstructive conduct.

We have simply listed the cases examined, under appropriate headings; where the reported decision indicates the defendant's apparent motive for seeking to present his own defense, that is shown in a parenthetical after each citation.

CASES IN WHICH THE DEFENDANT WAS ALLOWED TO REPRESENT HIMSELF AND DID SO IN AN ORDERLY FASHION

(1) *People v. Williams,* 2 Cal.3d 894, 88 Cal.Rptr. 208, 471 P.2d 1008 (1970) (Disagreement between defendant and counsel over trial strategy).

(2) *People v. Robles,* 2 Cal.3d 205, 85 Cal.Rptr. 166, 466 P.2d 710 (1970) (Defendant's reasons not stated).

(3) *People v. Redmond,* 71 Cal.2d 745, 79 Cal.Rptr. 529, 457 P.2d 321 (1969) (Defendant's reasons not stated).

(4) *People v. Vaughn,* 71 Cal.2d 406, 78 Cal.Rptr. 186 (1969) (Disagreement between defendant and

People v. Marcus, 133 Cal.App.2d 574, 284 P.2d (1955).

counsel over trial strategy).

(5) *People v. Maddox*, 67 Cal.2d 647, 63 Cal.Rptr. 371 (1967) (Disagreement between defendant and counsel over trial strategy).

(6) *People v. Carter*, 66 Cal.2d 666, 58 Cal.Rptr. 614, 427 P.2d 214 (1967) (Dissatisfaction with counsel).

(7) *People v. Robinson*, 62 Cal.2d 889, 44 Cal.Rptr. 762, 402 P.2d 834 (1965) (Defendant's reasons not stated).

(8) *People v. Martin*, 60 Cal.2d 615, 35 Cal.Rptr. 769, 387 P.2d 585 (1963) (Defendant's reasons not stated).

(9) *People v. Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, (1963) (Defendant's reasons not stated).

(10) *People v. Ashley*, 59 Cal.2d 339, 29 Cal.Rptr. 16 (1963) (Defendant's reasons not stated).

(11) *People v. Thomas*, 58 Cal.2d 121, 23 Cal.Rptr. 161, 373 P.2d 97 (1962) (Defendant's reasons not stated).

(12) *People v. Linden*, 52 Cal.2d 1, 338 P.2d 397 (1959) (Dissatisfaction with counsel).

(13) *People v. Mattson*, 51 Cal.2d 777, 336 P.2d 937 (1959) (Defendant wanted to participate and did not want counsel if that meant he could not do so).

(14) *People v. Jones*, 16 Cal.App.3d 837, 94 Cal.Rptr. 312 (1971) (Defendant wanted to represent himself because of dissatisfaction with public defender's office generally, and dissatisfaction with the particular deputy assigned to him).

(15) *People v. Johnson*, 13 Cal.App.3d 1, 91 Cal.Rptr. 203 (1970) (Did not desire to be represented

by public defender).

(16) *People v. Tracy*, 12 Cal.App.3d 94, 90 Cal.Rptr. 375 (1970) (Unhappy with public defender).

(17) *People v. Sneed*, 8 Cal.App.3d 963, 88 Cal.Rptr. 32 (1970) (Defendant's reasons not stated).

(18) *Ligda v. Sup. Ct. of Solano Cty.*, 5 Cal.App.3d 811, 85 Cal.Rptr. 744 (1970) (Defendant expressed lack of confidence in public defender).

(19) *People v. Kellett*, 1 Cal.App.3d 704, 81 Cal.Rptr. 917 (1969) (Defendant felt he could present defense more competently than appointed counsel).

(20) *People v. Armstrong*, 274 Cal.App.2d 297, 70 Cal. Rptr. 223 (1969) (Defendant's reasons not stated).

(21) *People v. Moore*, 270 Cal.App.2d 486, 76 Cal. Rptr. 150 (1969) (Defendant felt that attorney failed to confer with him adequately).

(22) *People v. Hill*, 268 Cal.App.2d 504, 74 Cal.Rptr. 180 (1960) (Defendant expressed lack of confidence in public defender).

(23) *People v. Kranhouse*, 265 Cal.App.2d 440, 71 Cal. Rptr. 223 (1968) (Defendant's reasons not stated).

(24) *People v. Brown*, 253 Cal.App.2d 820, 61 Cal. Rptr. 368 (1967) (Defendant wanted to represent himself because he had been successful in the past).

(25) *People v. Norman*, 252 Cal.App.2d 381, 60 Cal. Rptr. 609 (1967) (Defendant expressed lack of confidence in public defender).

(26) *People v. Montigo*, 248 Cal.App.2d 32, 56 Cal. Rptr. 33 (1967) (Defendant's reasons not stated).

(27) *People v. Bourland*, 247 Cal.App.2d 76, 55 Cal.Rptr. 357 (1966) (Defendant wanted to represent himself because he said defense proposed by public

defender would result in perjury).

(28) *People v. Wozniak*, 235 Cal.App.2d 243, 45 Cal.Rptr. 222 (1965) (Defendant's reasons not stated).

(29) *People v. Collins*, 220 Cal.App.2d 563, 33 Cal.Rptr. 638 (1963) (Dissatisfaction with public defender).

(30) *People v. Justice*, 211 Cal.App.2d 660, 27 Cal.Rptr. 465 (1963) (Disagreement between defendant and counsel over trial strategy).

(31) *People v. Clark*, 176 Cal.App.2d 316, 1 Cal.Rptr. 176 (1959) (Defendant felt he could present defense more competently than appointed counsel).

(32) *People v. Williams*, 74 Cal.App.2d 364, 345 P.2d 47 (1959) (Defendant expressed lack of confidence in public defender).

(33) *People v. O'Ward*, 168 Cal.App.2d 127, 335 P.2d 762 (1959) (Defendant's reasons not stated).

(34) *People v. Mims*, 160 Cal.App.2d 589, 325 P.2d 234 (1958) (Dissatisfaction with public defender).

(35) *People v. Loignon*, 160 Cal.App.2d 412, 325 P.2d 541 (1958) (Defendant felt he could present defense more competently than appointed counsel).

(36) *People v. Mayers*, 144 Cal.App.2d 55, 300 P.2d 145 (1956) (Defendant's reasons not stated).

(37) *People v. Lamb*, 133 Cal.App.2d 179, 283 P.2d 727 (1955) (Defendant's reasons not stated).

(38) *People v. Collins*, 117 Cal.App.2d 175, 255 P.2d 59 (1953) (Dissatisfaction with public defender).

(39) *People v. Acorta*, 114 Cal.App.2d 1, 249 P.2d 316 (1952) (Defendant's reasons not stated).

(40) *People v. Mimms*, 110 Cal.App.2d 310, 242 P.2d 331 (1952) (Defendant's reasons not stated).

(41) *People v. Simon*, 107 Cal.App.2d 105, 236 P.2d 855 (1951) (Defendant's reasons not stated).

(42) *People v. McCabe*, 60 Cal.App.2d 492, 141 P.2d 54 (1943) (Defendant's reasons not stated).

(43) *People v. Schneider*, 3 Cal.App.2d 1, 39 P.2d 258 (1935) (Defendant's reasons not stated).

(44) *People v. Russell*, 139 Cal.App. 417, 34 P.2d 203 (1934) (Dissatisfaction with counsel).

CASES IN WHICH THE DEFENDANT WAS ALLOWED TO REPRESENT HIMSELF AND ENGAGED IN DISRUPTIVE CONDUCT

There were no reported cases in this category

CASES IN WHICH THE DEFENDANT SOUGHT BUT WAS DENIED BY THE TRIAL COURT LEAVE TO DEFEND PRO SE

(1) *People v. Rhinehart*, 9 Cal.3d 139, 107 Cal.Rptr. 34 (1973) (Defendant did not wish to be represented by public defender).

(2) *People v. Siegenthaler*, 7 Cal.3d 465, 103 Cal.Rptr. 243, 499 P.2d 499 (1972) (Defendant's reasons not stated).

(3) *People v. Sharp*, 7 Cal.3d 448, 103 Cal.Rptr. 233, 499 P.2d 489 (1972) (Defendant felt he could present defense more competently than appointed counsel).

(4) *People v. Noah*, 5 Cal.3d 469, 96 Cal.Rptr. 441, 487 P.2d 1009 (1971) (Defendant's reasons not stated).

(5) *People v. Floyd*, 1 Cal.3d 694, 83 Cal.Rptr. 608 (1970) (Defendant's reasons not stated).

(6) *People v. Daniels*, 71 Cal.2d 1119, 80 Cal. Rptr. 897 (1969) (Dissatisfaction with counsel).

(7) *People v. Darling*, 58 Cal.2d 15, 22 Cal.Rptr. 484 (1962) (Defendant's reasons not stated).

(8) *In re Cathey*, 55 Cal.2d 679, 12 Cal.Rptr. 762 (1961) (Defendant felt counsel had conflicting interests).

(9) *People v. Northcott*, 209 Cal. 639, 289 P. 634 (1930) (Defendant wanted to cross-examine adverse witnesses).

(10) *People v. Braun*, 29 Cal.App.3d 949, 106 Cal.Rptr. 56 (1973) (Dissatisfaction with counsel).

(11) *People v. Jacobs*, 27 Cal.App.3d 246. 103 Cal.Rptr. 536 (1972) (Dissatisfaction with public defender).

(12) *People v. Enciso*, 25 Cal.App.3d 49, 101 Cal.Rptr. 590 (1972) (Defendant's reasons not stated).

(13) *People v. Nabor*, 12 Cal.App.3d 380, 90 Cal.Rptr. 649 (1970) (Defendant felt he could present defense more competently than appointed counsel).

(14) *People v. Ochoa*, 9 Cal.App.3d 500, 88 Cal.Rptr. 399 (1970) (Dissatisfaction between defendant and counsel over trial strategy).

(15) People v. Weston, 9 Cal.App.3d 330, 87 Cal.Rptr. 922 (1970) (Dissatisfaction with public defender).

(16) *People v. Hagen*, 6 Cal.App.3d 35, 85 Cal.Rptr. 556 (1970) (Defendant's reasons not stated).

(17) *People v. King*, 276 Cal.App.2d 781, 81 Cal.Rptr. 336 (1969) (Defendant did not wish to be represented by public defender).

(18) *People v. Sullivan*, 271 Cal.App.2d 531, 77 Cal.Rptr. 25 (1969) (Defendant's reasons not stated).

(19) *People v. Conway*, 271 Cal.App.2d 15, 76 Cal. Rptr. 251 (1969) (Defendant's reasons not stated).

(20) *People v. Bonville*, 267 Cal.App.2d 4, 72 Cal.Rptr. 592 (1968) (Dissatisfaction with public defender).

(21) *People v. Ruiz*, 263 Cal.App.2d 216, 69 Cal.Rptr. 473 (1968) (Defendant did not wish to be represented by public defender).

(22) *People v. Johnson*, 258 Cal.App.2d 165, 65 Cal.Rptr. 441 (1968) (Defendant expressed lack of confidence in public defender).

(23) *People v. Powers*, 256 Cal.App.2d 904, 64 Cal.Rptr. 450 (1967) (Dissatisfaction with counsel).

(24) *People v. Addison*, 256 Cal.App.2d 18, 63 Cal.Rptr. 626 (1967) (Defendant's reasons not stated).

(25) *People v. Taylor*, 250 Cal.App.2d 367, 58 Cal.Rptr. 269 (1967) (Defendant's reasons not stated).

(26) *People v. Johnson*, 241 Cal.App.2d 423, 50 Cal.Rptr. 598 (1966) (Dissatisfaction with counsel).

(27) *People v. Shields*, 232 Cal.App.2d 716, 43 Cal.Rptr. 188 (1965) (Disagreement between defendant and counsel over trial strategy).

(28) *People v. Shroyer*, 203 Cal.App.2d 478, 21 Cal.Rptr. 460 (1962) (Dissatisfaction with public defender).

(29) *People v. Duncan*, 175 Cal.App.2d 372, 346 P.2d 521 (1959) (Defendant's reasons not stated).

(30) *People v. Marcus*, 133 Cal.App.2d 579, 284 P.2d 848 (1955) (Defendant contended fair trial impossible if represented by court-appointed counsel; defendant, who was charged with assault with deadly weapon in prison, wanted to show the "bestial treatment" to which he allegedly was subjected in prison).

(31) *People v. Kerr*, 113 Cal.App.2d 90, 247 P.2d 927 (1952) (Defendant's reasons not stated).

(32) *People v. Glenn*, 96 Cal.App.2d 859, 216 P.2d 457 (1950) (Defendant wanted to participate in jury selection).

APPENDIX B

Excerpt from *Hodge v. United States*, 414 F.2d 1040, 1048-49 n. E (9th Cir. 1969) (Ely, J., dissenting):

I imagine a colloquy which suggests the type of inquiry which would wholly eliminate the difficult problem which has met us here and, of more importance, would surely have not infringed fifth amendment rights. The imagined colloquy is as follows:

> THE COURT: Mr. Attorney, you tell me that the defendant chooses to waive counsel and represent himself because of the arising of "a difference of opinion this morning." I do not know the specific nature of the "difference of opinion." I know nothing of the defendant's competency or of his intelligence of understanding. The right to counsel is a crucial right. The Supreme Court has directed that no district judge, including me, may accept a defendant's waiver of counsel absent conviction that the waiver and the assertion of the correlative right of self-representation are knowingly and intelligently made. Under Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1947), I must, as far as practicable, satisfy myself reasonably that the defendant understands defenses which might be available to him, that he has been made aware of mitigating circumstances which might operate to his favor, that he apprehends the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, and other facts essential to a broad understanding of the whole matter. Either in your conference with the defendant this morning, or in any other conference, if you have had such, have you covered all of the matters which I have mentioned?

MR. ATTORNEY: I would not like to represent to your Honor that I have covered all of those matters as specifically as would seem to be required by the opinion of Mr. Justice Black in Von Moltke and the opinion of the Court of Appeals of the Ninth Circuit in Sessions v. Wilson, 372 F.2d 366 (9th Cir. 1966). Would your Honor permit me to confer with the defendant for an additional thirty minutes?

THE COURT: Certainly.

(Thirty minute recess)

THE COURT: Mr. Attorney, have you had a further conference with your client?

MR. ATTORNEY: Yes, your Honor.

THE COURT: Have you made the explanation I suggested covering the specific matters indicated?

MR. ATTORNEY: Yes, sir.

THE COURT: Did it appear that your client understood, insofar as it could be expected that a layman could do so, the explanations which you made?

MR. ATTORNEY: Yes, your Honor.

THE COURT: Very well. Mr. Defendant, you have heard the exchange of comments between the Court and the Attorney. Has the Attorney undertaken to make you aware of those factors which I have mentioned as being important to your case?

THE DEFENDANT: Yes, your Honor, he has.

THE COURT: Did you understand what he said?

THE DEFENDANT: Yes, I did.

THE COURT: Mr. Defendant, you have pleaded not guilty to the offense with which you are charged. The right to an attorney is a precious right, and it is the Court's view that you would be

far better able to defend yourself if you allowed the attorney, with which the Government has provided you, to proceed. I understand that you have a very limited education and that your only experience in court matters has been in connection with insignificant, comparatively petty offenses. I strongly suggest that you do not endeavor to represent yourself. Now, in view of all that has been said, what is your wish?

THE DEFENDANT: Your Honor, I still believe that I would like to act as my own attorney.

THE COURT: Very well, Mr. Defendant. You leave me no choice. You have the constitutional right to waive the assistance of an attorney and to represent yourself, provided that you exercise the right competently, knowingly, and intelligently. Upon the record, I make the finding that you do so. Mr. Attorney, you are relieved as active counsel, but, if the defendant has no objection, I ask that you stand by during the trial to offer the defendant such precedural guidance as he might request of you. In that connection, Mr. Attorney, there have been occasions when lawyers of the indigent panel have been rather lax in the performance of their duties. Too many cooks do not improve the soup, and I want you, yourself, to be present during the defendant's trial. You are the only attorney who is familiar with the details of the case. My purpose is to insure that justice is done, and the accomplishment of that object might be frustrated if you were not available and other attorneys, with no knowledge of the facts, would step in from time to time as substitutes. Is that clear?

MR. ATTORNEY: Yes, your Honor.

THE COURT: Very well, The trial will be scheduled for this coming March 23d at 9:30 a.m. I will not proceed with other matters.